162 US 339

RECORD, CASE No. 15,128.

162-339

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1158~~. ~~605~~ 446 159

THE GREAT WESTERN TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

BARBARA BURNHAM, CHARLES T. BURNHAM, AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

FILED SEPTEMBER 8, 1892.

RECORD, CASE No. 15,128.

SUPREME COURT OF THE UNITED STATES.

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TERM No, 1158.

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IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

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1 UNITED STATES OF AMERICA.

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Pleas before the circuit court of Milwaukee county, in the State of Wisconsin, at a regular term of said court of said county, begun and holden at the court-house, in the city of Milwaukee, in said county and State, on the first Monday, being the 5th day, of November, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Present: The Honorable D. H. Johnson, judge of the circuit court of Milwaukee county; William A. Walker, state's attorney; Newell Daniels, sheriff of Milwaukee county.
Attest: IGNATZ CZERWINSKI, *Clerk.*

Be it remembered that heretofore, to wit, on the 9th day of December, in the year of our Lord one thousand eight hundred and eighty-eight, there was filed in the office of the clerk of said court the people's writ of summons in a certain cause therein commenced, and wherein The Great Western Telegraph Company was plaintiff and George Burnham was defendant, and which said writ, with the return of the sheriff thereon endorsed, is in the words and figures as follows:

[Seal Circuit Court, Milwaukee Co., Wisconsin.]

2 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY }
vs.
GEORGE BURNHAM. }

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint; of which a copy is herewith served upon you.

SHEPARD & SHEPARD,
Plaintiff's Attorneys.

P. O. address: Nos. 86, 87, and 88 New Insurance building, Milwaukee, Milwaukee county, Wis.

3 MILWAUKEE COUNTY, ss:

I certify that at the city and county of Milwaukee, on the 8th day of October, A. D. 1888, I served the within summons and complaint hereto annexed on the within-named defendant, George

Burnham, personally by delivering to and leaving with him a true copy thereof and of each of them.

NEWELL DANIELS, *Sheriff*,
By JOHN KEOGH, *Deputy*.

Fees—Services	1 00
Travel	20
Copies	3 90
	$5 10

4 And afterwards, to wit, on the 5th day of January, A. D. 1889, there was filed in the office of the clerk of said court a certain complaint, which is in the words and figures as follows, to wit:

5 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
v.
GEORGE BURNHAM.

The complaint of the plaintiff alleges that it is and at the times hereinafter mentioned was a foreign corporation duly organized in 1867, at Chicago, in Illinois, and still existing under and by virtue of a law of the State of Illinois providing for the establishment of telegraphs, which was enacted and went into effect in the year 1849, and having a capital stock of three million dollars, divided into shares of the par value of twenty-five dollars each, the subscriptions and payments for which stock by its subscribers and stockholders constituted and still constitute the means and fund for the prosecution of the plaintiff's business and the payment of its debts.

The plaintiff being so organized as aforesaid, the defendant, on May 8, 1869, at Milwaukee, in said county, made and entered into a written agreement with it, in and by which he subscribed for and agreed to and with the plaintiff to take one hundred shares of the plaintiff's capital stock and pay for the same as follows: Five per cent. of the par value thereof at the time of making said agreement and the balance of said par value thereof, to wit, of twenty-five dollars upon each share so subscribed for, from time to time as the plaintiff's directors shall order; of which contract, in the form signed by the defendant and all other subscribers and stockholders, a copy marked Exhibit "A" is annexed as a part of this complaint.

And the defendant thereby, for a valuable consideration, undertook and promised to pay the plaintiff for each and every share so subscribed for by him the sum of twenty-five dollars (except
6 five per cent. thereof, which was payable by the terms of said agreement at the time of making the same), in such installments and at such times as he might be lawfully called upon and required to pay the same and according to the legal tender and effect of his agreement.

The plaintiff further avers that the defendant has heretofore paid

to it ten dollars upon each and every share so subscribed for and agreed to be taken by him, or a total sum of one thousand dollars upon all of said shares, but that he has never paid to it any other sum than aforesaid upon his said shares or any of them, so that there was on hand before July 10, 1886, and unpaid balance of fifteen dollars upon each and every of said shares and then liable to be called for and ordered and required by the directors of the plaintiff or by other competent and legal authority to be paid under and by virtue of the terms of said agreement.

The plaintiff further avers that a large number of other persons than the defendant subscribed for and agreed to take other of said capital stock and to the extent and amount, including those subscribed for by the defendant as aforesaid, of all the shares into which said capital stock was divided; that the several agreements by which said other persons agreed to take said other shares were similar in all respects to the defendant's said agreement except as to the name of the subscriber, his residence, date of his subscription, and the number of such shares agreed to be taken; that all of said subscriptions and agreements were made in the years 1868, 1869, 1870, and 1871; that the several persons, including the defendant,

7 who so subscribed for and agreed to take the shares of said capital stock as aforesaid thereby became stockholders of the plaintiff and subscribers to its capital stock; that they number more than two thousand different persons and are wi*l*d-ly scattered and reside in more than twelve different States and Territories of the United States of America and in other countries and the names and residences of many of them are unknown to the officers of the plaintiff.

Thereafter, to wit, on or about Nov. 19, 1869, in the circuit court of Cook county, in said State of Illinois, being a court of record and general, legal, and equitable jurisdiction, was begun a certain suit, wherein one Jeremiah Terwilliger and certain other persons, stockholders of the plaintiff, were complainants, and which suit was so begun in behalf as well of others similarly situated as of said Terwilliger and his co-complainants therein, and also wherein the plaintiff and others were defendants, and in which suit the plaintiff was duly summoned and appeared and submitted to the jurisdiction of said court, and which suit has been ever since it was begun and now is pending and undetermined in said court; and thereafter certain proceedings were had therein, and, among other things, said circuit court of Cook county, Illinois, upon due notice to all parties in said suit, for due cause and with full authority, did therein, on Oct. 7, 1874, take jurisdiction and control of the plaintiff and its powers, property, and affairs and appoint a receiver for the plaintiff and conferred upon him all the powers usually granted to and all the duties usually imposed upon receivers in such cases, which

8 order of appointment has never been heretofore revoked, vacated, annulled, or set aside, and the business, powers, and duties of the plaintiff and of its board of directors have been thereby vested in and exercised, managed, and controlled by said circuit court of Cook county, Illinois, and the receiver for the plain-

tiff at all times heretofore from the date of said appointment, of all which the defendant has had due notice.

And one Elias R. Bowen, of said Chicago, is now the receiver of the plaintiff, appointed as aforesaid, and has been such for many years continuously last past, and as such receiver has been and is in possession of and entitled to receive property and effects of the plaintiff, and this action is brought by his orders and in pursuance of his authority as such receiver for the purpose of collecting the assets and paying the debts of the plaintiff.

The plaintiff further avers that before July 10, 1886, it had become and was justly indebted to sundry persons in a large amount, to wit, in the sum of $400,000, which has never been paid, but the whole of said indebtedness accrued against it after the making and entering into the defendant's said contract of subscription and agreement to take and pay for his said shares; that on said date and long before then it had no property with which to pay any of its said indebtedness except the amounts unpaid upon the shares of its capital stock subscribed for and agreed to be taken by the defendant and its other stockholders and subscribers to its capital stock as aforesaid, which said unpaid amounts were largely in excess of its said indebtedness; that before said last-named date a small number of its stockholders had paid to the plaintiff twenty-
9 five dollars on each of the shares of its stock subscribed for by them respectively, being the par value and in full for the same; that none of the remainder of the said stockholders and subscribers had not before said last-named date nor have any of them now paid more than ten dollars upon each of the shares of capital stock severally subscribed for or held by them; that many of them have never paid more than fifty cents upon each of such shares severally subscribed for by them, and there was on said last-named date a balance and amount unpaid upon each of the shares of said capital stock, except those which had been paid for in full as aforesaid, including those subscribed for by the defendant as aforesaid, of not less than fifteen dollars, and which said stockholders, including the defendant, were on said date liable to be severally called upon and ordered to pay according to the term of their several agreements of subscription; that it therefore became and was necessary that said stockholders and each of them (except those who had paid in full), including the defendant, should severally be ordered to contribute and pay a certain portion *pro rata* of the par value of the shares of said capital stock so subscribed for by them to be used and applied in payment of said indebtedness and of the expenses of said receiver incurred in and about the affairs of the plaintiff.

The plaintiff further avers that in said chancery suit of Terwilliger and others against this plaintiff and others in said circuit court of Cook county all of its stockholders were not made parties, either complaining or defending, for the reason, among others, that it was impracticable to make them such parties, and in said suit certain other proceedings were had, among which said court, having
10 then and there full and complete jurisdiction and authority in the premises, did on July 10, 1886, render a certain decree

in and by which it did find and declare, order and decree, as follows, to wit:

That the plaintiff is a corporation which was duly organized in 1867 under a law of said State providing for the establishment of telegraphs, which was enacted and went into effect in 1849; that said suit was commenced in 1869 against the plaintiff and certain other persons who were each duly served with process and appeared in said suit in person and by counsel, and said suit has ever since been and is now pending and undetermined in said court; that a receiver of and for the plaintiff and its property, both real and personal, was appointed on Oct. 7, 1874, upon supplemental bill of complaint filed in said suit and on account of mismanagement and malfeasance of its then officers, and as alleged and set forth in said supplemental bill and as well by consent and stipulation of the plaintiff and the other parties to said suit; that said receivership has never since then been discontinued; that the plaintiff is legally indebted, to wit, in the sum of more than $375,000, which indebtedness is in the form of judgments and decrees rendered against it; that about two-thirds of said indebtedness accrued against it and was created previous to Sept. 1, 1872, and on account of the construction of its telegraph lines and other property and material furnished and labor performed and money advanced in and about such construction and in and about the operation of its telegraph lines; that a large portion of this two-thirds of said indebtedness *of said indebtedness* was and is for money loaned and advanced to it and which was used by it in the construction of and operation of its
11 telegraph lines and other property; that said court before July 10, 1886, by reference had for that purpose in said suit, had determined and found the entire indebtedness of the plaintiff and the name of each creditor of it and the amount due each, and that the same then appeared by the records in said suit; that each and all said creditors under the orders of said court in said suit did make proofs before said court of their several claims, judgments, and decrees against the plaintiff, and did thereby make themselves parties to said suit; that all the property of the plaintiff had before said last-mentioned date been sold and disposed of under the orders of said court in said suit subsequent to the appointment of the receiver as aforesaid, and the proceeds therefrom distributed to its creditors, and on that date it had no property, real or personal, except as thereinafter stated in said decree with which said indebtedness or any part thereof could be paid; that the only means or resources that it had on said last-mentioned date for the payment of its said indebtedness were and are the balances and amounts remaining unpaid and due from its stockholders upon their several subscriptions to its capital stock and the amounts unpaid upon the capital stock of the plaintiff; that there are about two thousand stockholders of the plaintiff who are widely scattered through more than twelve different States and Territories of the United States and other places, and the larger portion of whom live at great distances from the place of holding said court and from said Cook county, while the residences of many of them are entirely unknown to said receiver or his

solicitor, although diligent inquiry has been made by them in reference thereto, and it was and is therefore impracticable that
12 all of said stockholders should be made parties to said suit and proceeding; that the subscriptions to the shares of said capital stock were made principally in the years 1868, 1869, 1870, and 1871; that many of the stockholders of the plaintiff have become insolvent or have died since their subscriptions were made; that a few of said stockholders have paid the full par value of the shares of said stock subscribed for or held by them, namely, $25 on each share; that some of them have paid 40 per cent. of such par value, or $10 on each share subscribed for or held by them; that many of said stockholders have paid only 50 cts. on each share subscribed for or held by them; that all of said stockholders, excepting those who have paid $25 on each of the shares of said stock subscribed for or held by them respectively, now owe and are liable to the plaintiff for an unpaid balance upon their several subscriptions to said stock not less than $15 on each share or sixty per cent. of the par value thereof, and that many of them owe thereon much more than 60 per cent. of the par value; that the liability of the stockholders of the plaintiff is based upon and controlled by contracts of subscription made with it, and in and by which contracts said stockholders agree to take the number of shares subscribed for by them and pay for the same in installments as follows: five per cent. of the par value thereof at the time of making their respective subscriptions therefor and the balance of said par value as the directors of the plaintiff from time to time should order; that the said stockholders who have not paid in full as aforesaid are severally liable to the plaintiff for the balance now unpaid upon the shares of such stock subscribed for or
13 held by them, being the difference between the amounts actually paid thereon and the par value thereof; that said unpaid balances still remain liable to be called for and ordered and required to be paid by said subscribers, stockholders, and their assigns; that the collection of whatever sums are required to be paid by said stockholders in order to pay said indebtedness is likely to be attained with great difficulty, labor, and expense, and that it was therefore necessary and proper that 35 per cent. of the par value of each share of the capital stock subscribed for and agreed to be taken or held by said stockholders and not paid for in full should be called for and required to be paid by them and their assigns for the purpose of paying said indebtedness, and which said findings and declarations by said court in said decree, the plaintiff avers, were and are true.

The plaintiff further avers that for the purpose of paying its indebtedness said court did also in and by said decree order and adjudge and decree that a call or assessment be made upon the stock and stockholders of the plaintiff (except those who had paid in full), their legal representatives and assigns, of 35 per cent of the par value of the shares of said stock subscribed for or held by them repectively, being $8.75 on each and every share thereof, and that its stockholders and every one of them (except those who have paid

$25 on every share subscribed for or held by them) and their legal representatives and assigns pay to the receiver of the plaintiff, said Elias R. Bowen, the several amounts so called for, assessed, and ordered to be paid, namely, $8.75 on each and every share subscribed for or held by them respectively, and that the same be paid upon the demand of said receiver or his agent, who should at once proceed to collect the sums so ordered paid by said decree and make all necessary demands for such payments, employ such assistance and counsel, take such action, and constitute such suits,
14 actions, and proceedings in the name of the plaintiff and in such jurisdictions as said receiver should be advised or should deem expedient or proper for the purpose of enforcing the payment of all of said sums so ordered paid as aforsaid, and which said decree was duly entered of record in said suit on July 10, 1886, of all which the defendant had notice.

And the plaintiffs avers that thereupon and from the time of making and entering said decree as aforesaid and thereby the defendant became indebted to the plaintiff and was and is liable to pay to the plaintiff for the use of said receiver the sum of $8.75 upon each and every of the said shares so subscribed for by him as aforesaid, to wit, the sum of $875 in all upon and according to the demand of said Elias R. Bowen, as receiver of the plaintiff; that said Bowen, as such receiver and in pursuance of the terms of said decree, did, on Oct. 7, 1887, at Milwaukee, in said county, make due demand upon the defendant that he pay to him as the receiver of the plaintiff said sum last above mentioned, and also at the same time gave due notice to the defendant of the making and entering of said decree, and that although often requested the defendant has not paid any part of said sum so due on his said capital stock pursuant to said assessment and decree, but has neglected and refused to pay the same and still so refuses, to the damage of the plaintiff in the sum of $875, with legal interest thereon from July 10, 1886.

Wherefore the plaintiff prays judgment in its favor and against the defendant for eight hundred and seventy-five dollars ($875) and interest as aforesaid as its damages and for its costs of the action.

SHEPARD & SHEPARD,
Plaintiff's Attorneys.

15 EXHIBIT "A."

"Capital, $3,000,000; shares, $25; assessments not to exceed $10 on a share.

"*Subscription List for the Capital Stock of the 'Great Western Telegraph Company.'*

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names and pay for the same in installments, to wit, 5 per cent. on amount paid in and the balance as the directors from

time to time may order. In consideration thereof the Great Western Telegraph Company agrees that when forty per cent. of the par value of the shares shall have been paid under such orders and the installment receipts therefore surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full- paid stock by the said company.

"—— —— is appointed agent to solicit stock and receive only the first installment of five per cent. (fifty cents on a share) at the time of the subscription.

"—— ——, *Secretary.*

"Names, ——; residence, ——; date of subscription, ——; number of shares, ——."

16 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *vs.* George Burnham. Summons & complaint. Shepard & Shepard, att'ys for plaintiff. Filed January 5, 1889. John B. Millington, clerk.

17 And afterwards, to wit, on the 17th day of November, A. D. 1888, there was filed in the office of the clerk of said court and in said cause a certain demurrer, which is in the words and figures as follows, to wit:

18 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
against
GEORGE BURNHAM, Defendant.

And now comes the above-named defendant, by Quarles, Spence & Dyer, his attorneys, and demurs to the complaint of the plaintiff in the above-entitled action on the ground that it appears upon the face thereof:

I.

That said plaintiff has not legal capacity to sue, for the reason that a receiver of all the property and rights of said plaintiff has been appointed, who has succeeded to all the rights and property of said plaintiff.

II.

That there is a defect of parties plaintiff, for that said plaintiff is not the real party in interest in said action and has no interest therein.

III.

That said complaint does not state facts sufficient to constitute a cause of action.

IV.

That said action was not commenced within the time limited by law, to wit, within the time limited in either subdivision 3 or 4 or

7 of section 4222 or section 4247 or section 4252 of Revised Statutes of Wisconsin.

QUARLES, SPENCE & DYER,
Def't's Att'ys, Milwaukee, Wis.

Nov. 1, '88.

19 [Endorsed:] 10672. Circuit court, Milwaukee county. Great Western Telegraph Company, pl'ff, *vs.* George Burnham, def't. Demurrer to complaint. Original. Quarles, Spence & Dyer, attorneys for defendants, Milwaukee, Milwaukee county, Wis. Due service of the within admitted this 14th day of Nov., 1888. Shepard & Shepard, pl'ff's att'ys. Filed Nov. 17, 1888. John B. Millington, clerk.

20 And afterwards, to wit, on the 21st day of November, A. D. 1888, there was filed in the office of the clerk of said court and in said cause a certain affidavit, which is in the words and figures as follows, to wit:

21 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
against
GEORGE BURNHAM, Defendant.

STATE OF WISCONSIN, *Milwaukee County,* } *ss:*

Charles Quarles, being duly sworn, says he is one of the attorneys of the defendant above named, and makes this affidavit on his behalf; that the above-entitled action has been commenced by the above-named plaintiff against the above-named defendant; that said plaintiff is a foreign corporation, to wit, a corporation of and organized under the laws of the State of Illinois, and that this action has been commenced in said court in the name of a foreign corporation.

CHAS. QUARLES.

Subscribed and sworn to before me this 24th day of October, A. D. 1888.

H. P. RICHARDSON,
Notary Public for Wisc.

22 [Endorsed:] 10672. Circuit court, Milwaukee county. Great Western Telegraph Co. *vs.* George Burnham. Affidavit to obtain security for costs & order. Quarles, Spence & Dyer, def't's att'ys. Filed Nov. 21, 1888. John B. Millington, clerk.

23 And afterwards, to wit, on the 20th day of November, A. D. 1888, the same being one of the days of the November term, of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

24 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
against
GEORGE BURNHAM, Defendant.

On reading and filing the affidavit of Charles Quarles hereto annexed and on the records of the above-entitled action and on the papers served and filed therein and on motion of Quarles, Spence & Dyer, attorneys for defendant above named—

It is hereby ordered that the plaintiff above named be, and it is hereby, required to file security for all costs that may be incurred by the defendant in said action in the sum of two hundred and fifty dollars within twenty days after the service upon its attorneys of a copy of this order, and that all proceedings on the part of said plaintiff in this action be stayed until such security be filed, and that with this order a copy of the affidavit of Charles Quarles above described be served on said plaintiff.

D. H. JOHNSON,
Circuit Judge.

Dated Milwaukee, Nov. 20, A. D. 1888.

25 [Endorsed:] 10672. Order for filing security for costs. Filed Nov. 21, 1888. John B. Millington, clerk.

26 And afterwards, to wit, on the 18th day of May, A. D. 1889, there was filed in the office of the clerk of said court in said cause a certain suggestion and stipulation, which is in the words and figures as follows, to wit:

27 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
vs.
GEORGE BURNHAM.

Now comes the plaintiff, by Shepard & Shepard, its attorneys, and suggests to the court that on March 2, 1889, the defendant departed this life testate; that the cause of action herein, if any exists, has survived against his estate, and that April 4, 1889, his will was duly admitted to probate in the county court of Milwaukee county, acting as a court of probate and having jurisdiction of the same, and that Barbara Burnham, Charles T. Burnham, and John Q. Burnham, who were appointed by his said will *will* the executors thereof, were then and there duly approved as such by said court and qualified as such executors and entered on their duties as such, and are still so acting, and that the estate of said defendant, deceased, is still in process of administration, and therefore the plaintiff moves that the action be revived against said executors.

Dated May 11, 1889.

SHEPARD & SHEPARD,
Plaintiff's Attorneys.

It is hereby stipulated between the parties, by their attorneys, that the facts set forth in the foregoing suggestion are true, and that upon said suggestion and the files and records herein an order may be entered without notice for the revival of the action against the executors of the defendant, deceased, and that the action henceforth proceed against said executor, as the defendants herein.

Dated May 11, 1889.

SHEPARD & SHEPARD,
Plaintiff's Att'ys.
QUARLES, SPENCE & DYER,
Defendant's Att'ys.

28 [Endorsed:] Filed May 18, '89. A. De Leur, clerk.

29 And afterwards, to wit, on the 11th day of May, A. D. 1889, the same being one of the days of the May term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

30 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
v.
GEORGE BURNHAM.

At a general term of said court in and for said county, begun on May 6, 1889, and held at the court-house, in the city of Milwaukee, in said county.

Present: Hon. D. H. Johnson, circuit judge.

Upon the foregoing suggestion and stipulation, and upon the files and records herein, and upon motion of Shepard & Shepard, plaintiff's attorneys, and the consent of Quarles, Spence & Dyer, defendant's attorneys, thereto in open court—

It is ordered that this action be, and is hereby, revived against Barbara Burnham, Charles T. Burnham, John Q. Burnham, as executors of the defendant, George Burnham, deceased, and that the action henceforth proceed against said executors as such and under the title of the action as amended by the substitution of their names as defendants, with the same effect as if it never had been abated by the death of George Burnham, defendant.

By the court:

D. H. JOHNSON,
Circuit Judge.

Dated May 11, 1889.

31 [Endorsed:] 10672. Circuit court, Milwaukee county, The Great Western Telegraph Company *v.* George Burnham. Suggestion, stipulation, & order. Filed May 18, '89. A. De Leur, clerk.

32 And afterwards, to wit, on the 2nd day of November, A. D. 1889, the same being one of the days of the September

term of said court, the following, among other, proceedings were had in said court and in said cause and entered of record, to wit:

33 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
v.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNham, as Executors of the Last Will and Testament of George Burnham, Deceased.

At a general term of said court in and for said county, begun on September 2, 1889, and held at the court-house in Milwaukee.

Present: Hon. D. H. Johnson, circuit judge.

The demurrer of said testator of the present defendants, to wit, George Burnham, the original defendant to the complaint, having come on to — heard at this term and having been duly argued by counsel and considered by the court:

Now, on motion of Shepard & Shepard, plaintiff's attorneys—

It is ordered that said demurrer be and is hereby overruled with $10 costs of the motion, and that the defendants have leave to answer over on payment of said costs within twenty days from this date.

Dated November 2, 1889.

By the court:

D. H. JOHNSON,
Circuit Judge.

34 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *v.* Barbara Burnham *et al.* as executors, &c. Order overruling demurrer. Shepard & Shepard, pl'ff's att'ys. Filed Dec. 9, 1889. Clarence Kellogg, clerk of supreme court Wis. Filed Nov. 2, 1889. A. de Leur, clerk.

35 And afterwards, to wit, on the 9th day of December, A. D. 1889, there was filed in the office of the clerk of said court in said cause a cer*at*in appeal bond, which is in the words and figures as follows, to wit:

36 *Undertaking on Appeal.*

Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNham, as Executors of the Last Will and Testament of George Burnham, Deceased, *Plaintiff.*

Whereas, on the second day of November, A. D. 1889, in the circuit court of Milwaukee county, an order was made and entered in the above-entitled action overruling the demurrer of the defendants therein and for ten dollars costs of the motion, amounting in the

aggregate to ten dollars costs; and the above-named appellants, feeling aggrieved thereby, intend to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, Weed B. Smith, of the city of Milwaukee, county of Milwaukee and State of Wisconsin, and J. B. Conrad, of the city of Milwaukee, county of Milwaukee and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars.

WEED B. SMITH.
J. B. CONRAD.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Weed B. Smith, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident and householder or freeholder within the State of Wisconsin, and is worth the sum of two hundred & fifty dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

WEED B. SMITH.

Subscribed and sworn to before me this 16th day of November, A. D. 1889.

D. G. ROGERS,
Notary Public.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

J. B. Conrad, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident and householder or freeholder within the State of Wisconsin, and is worth the sum of two hundred and fifty dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

J. B. CONRAD.

Subscribed and sworn to before me this 16th day of November, A. D. 1889.

D. G. ROGERS,
Notary Public.

37 [Endorsed:] 10672. Circuit court, Milwaukee county. Great Western Telegraph Co. *vs.* Burnham, ex'rs. Undertaking on appeal. Service of a copy of the within undertaking admitted this 18th day of November, 1889. —— ——, pl'ff's att'ys. A. de Leur, clerk of said court. Received November 18th, 1889. Shepard & Shepard. Filed Dec. 9, 1889. Clarence Kellogg, clerk of supreme court Wis.

38 And afterwards, to wit, on the 9th day of December, A. D. 1889, there was filed in the office of the clerk of said court and in said cause a certain notice of appeal, which is in the words and figures as follows, to wit:

39 *Notice of Appeal to Supreme Court.*

Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, & JOHN Q. BURNham, as Executors of the Last Will and Testament of George Burnham, Deceased, Defendants.

To Shepard & Shepard, attorneys for plaintiff, and A. De Leur, clerk of the aforesaid court:

Please take notice that the above-named defendants appeal from the order made by the above-named court herein, entered on the second day of November, A. D. 1889, in favor of the plaintiff and against the defendants, and from the whole and every part thereof, said order being that the demurrer of said defendants in said action be overruled, with ten dollars costs of the motion.

Yours, etc., QUARLES, SPENCE & DYER,
Attorneys for Defendants.

40 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *vs.* Barbara Burnham *et al.*, ex'rs. Notice of appeal to supreme court. Service of a copy of the within notice admitted this 18th day of November, 1889. —— ——, pl'ff's attorneys. A. de Leur, clerk of said court. Received November 18, 1889. Shepard & Shepard. Filed Dec. 9, 1889. Clarence Kellogg, clerk of the supreme court Wis. Filed Nov'b'r 18, 1889. A. de Leur, cl'k.

41 That afterwards, to wit, on the 9th day of December, 1889, there was filed in the office of the clerk of said court in said cause a certain return on appeal or certificate, which is in the words and figures as follows, to wit:

42 STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

Circuit Court.

THE GREAT WESTERN TELEGRAPH COMPANY
against
BARB. BURNHAM *et al.*

MILWAUKEE COUNTY, *ss:*

I, A. de Leur, clerk of the circuit court in and for the county of Milwaukee & State of Wisconsin, do hereby certify that the process, pleadings, and other papers hereunto annexed are the originals and

all the papers filed in the above-entitled action, and that the same are herewith transmitted to the supreme court of the State of Wisconsin, pursuant to notice of appeal hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Milwaukee, this 6th day of Dec'b'r, A. D. 1889.

[Seal Circuit Ct.]

A. DE LEUR,
Clerk of the Circuit Court, Milwaukee County, Wis.

43 [Endorsed:] Circuit court, Milwaukee county. The Great Western Telegraph Company against Barbara Burnham *et al.*, ex. Return on appeal to supreme court of the State of Wisconsin. Filed Dec. 9, 1889. Clarence Kellogg, clerk of supreme court Wis.

44 And afterwards, to wit, on the 5th day of September, A. D. 1891, there was filed in the office of the clerk of said court in said cause a certified transcript of a certain order of judgment and remittitur of the supreme court of the State of Wisconsin and which is in the words and figures as follows, to wit:

45 Be it remembered that at a term of the supreme court of the State of Wisconsin begun and held at the capital, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the twelfth day of August, A. D. 1890, on the forty-fifth day of the term, to wit, on the sixteenth day of December, A. D. 1890—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassody, associate justices of said court—the following proceedings were had *inter alia*, to wit:

THE GREAT WESTERN TELEGRAPH CO., Respondent,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNHAM, as Executors of the Last Will and Testament of George Burnham, Deceased, Appellantes.

Appeal from circuit court, Milwaukee county, State of Wisconsin.

This cause came on to be heard on appeal from the order of the circuit court of Milwaukee county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the order of the circuit court of Milwaukee county overruling the demurrer to the complaint in this cause be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of one hundred & twenty-three & $\frac{25}{100}$ dollars ($123.25), and that this cause be, and the same is hereby, remanded to the said circuit court for such further proceedings therein as may be according to law.

STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and

foregoing with the original order and judgment of the court
46 in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand — affixed the seal of said court, at Madison, this twenty-fourth day of February, A. D. 1891.

CLARENCE KELLOGG,
[SEAL.] *Clerk of the Supreme Court of the State of Wisconsin.*

47 [Endorsed:] 10672. State of Wisconsin. Supreme court. The Great Western Telegraph Company, respondent, against Barbara Burnham *et al.*, appellants. Remittitur. Filed Sep. 5, '91. Ignatz Czerwinski, clerk.

48 And afterwards, to wit, on November 19th, 1891, there was filed in the office of the clerk of said court a certain bond for costs, which is in the words and figures as follows, to wit:

49 *Undertaking for Costs.*

Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNHAM, as Executors, &c., of George Burnham, Deceased.

Whereas an order may be made in the above-entitled action requiring the plaintiff above named to file security for all costs that may be incurred by the defendants in said action in the sum of two hundred and fifty dollars, within twenty days after the service of said order upon said plaintiff, and staying all proceedings on the part of said plaintiff in said action until such security be filed:

Now, therefore, we, Elias R. Bowen, of Chicago, Cook county, Illinois, receiver of said plaintiff corporation, and Frank G. Bigelow, of the city of Milwaukee, county of Milwaukee and State of Wisconsin, do undertake that the said plaintiff will pay on demand all costs that may be awarded to the said defendant in said action in any court not exceeding the sum of two hundred and fifty dollars.

In testimony whereof the parties above named have hereunto set their hands and seals this fourteenth day of November, A. D. 1891.

GREAT WESTERN TELEGRAPH COMPANY, [SEAL.]
By ELIAS R. BOWEN, *Its Receiver.* [SEAL.]
FRANK G. BIGELOW. [SEAL.]

In presence of—
THOMAS J. LUTHUBARD,
FRED. W. BOWEN,
Witnesses to the signature of Elias R. Bowen.

EDWARD W. FROST,
H. G. GOLL,
Witnesses to the signature of F. G. Bigelow.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Frank G. Bigelow, being duly sworn, says that he is worth the sum of five hundred (500) dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

FRANK G. BIGELOW.

Subscribed and sworn to before me this 18th day of November, A. D. 1891.

EDWARD W. FROST,
Notary Public, Milwaukee Co., Wis.

50 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *vs.* Barbara Burnham *et al.* Undertaking for costs. Service of the within paper this Nov. 19, 1891, is admitted. Quarles, Spence & Quarles, att'ys for defendants. Filed Nov. 19, 1891. Ignatz Czerwinski, clerk.

51 And afterwards, to wit, on the 24th day of December, A. D. 1891, there was filed in the office of the clerk of said court and in said cause a certain notice, which, together with the endorsements thereon, is in the words and figures as follows, to wit:

52 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNHAM, as Executors, etc., of George Burnham, Deceased.

To Quarles, Spence and Quarles, attorneys for defendants:

GENTLEMEN: You will please take notice that the remittitur herein from the supreme court of Wisconsin was filed in this court on September 5, 1891.

Milwaukee, 10, 14, '91.

SHEPARD & SHEPARD,
Plaintiff's Attorneys.

53 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western T. Co. *vs.* B. Burnham *et al.* Notice of remittitur. Shepard & Shepard, att'ys for pl'f. Service of the within paper this Oct. 14, 1891, is admitted. —— ——, att'ys for def'ts. Filed Dec. 24, 1891. Ignatz Czerwinski, clerk. Received Oct. 14, 1891. Quarles, Spence, Hoyt & Quarles, def'ts' attorneys.

54 And afterwards, to wit, on the 25th day of February, A. D. 1892, the same being one of the days of the January term of said court, the following, among other, proceedings were had in said court and in said cause and entered of record, to wit:

55 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
vs.
BARBARA BURNHAM *et al.*, Executors, Defendants.

On reading and filing the affidavit of Joseph V. Quarles, one of defendants' attorneys, hereto attached, and on all the papers filed with the clerk of this court and on all the proceedings hereto had in this case, let the plaintiff show cause before this court at the court-house in the city of Milwaukee, on the 5th day of March, 1892, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the complaint herein should not be dismissed and why judgment should not be entered upon the demurrer and upon the mandate of the supreme court in this cause, and why the defendant should not have the costs of this motion, and why such other, further, or different order or judgment should not be entered in this cause as to the court may seem just and proper.

Further ordered that a copy of the annexed affidavit and of this order to show cause be served upon the plaintiff's attorneys at least three days before the time to show cause.

Dated February 25, 1892.

D. H. JOHNSON.

56 And afterwards, to wit, on the 18th day of November, A. D. 1891, there was filed in the office of the clerk of said court and in said cause a certain statement and representation to the said court, which, together with the endorsements thereon, is in the words and figures as follows, to wit:

57 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNHAM, as Executors, etc., of George Burnham, Deceased.

And now, to wit, at the regular January term of the said court and on the 5th day of March, 1892, this action being duly brought on for further proceedings, according to law, and the opinion and directions of the supreme court on the appeal of the defendants from the former order of this court overruling their demurrer to the complaint, and being duly brought on for trial and final judgment, comes the plaintiff, by its attorneys, and refuses to amend its complaint, and respectfully shows to the court that it will stand upon its said complaint as well and sufficiently pleaded for the reasons that—

First. Said complaint duly and sufficiently pleads a valid and sufficient decree of assessment upon the stockholders of said The Great Western Telegraph Company, of whom said defendants' testator was one, duly rendered by the circuit court of Cook county, in the State of Illinois, on July 10, 1886, and to which decree full faith and credit must be given by the courts of the State of Wisconsin.

Second. Said complaint duly and sufficiently sets forth as the basis of the assessment upon the stockholders of the said Great Western Telegraph Company and upon the said defendants' testator sued for herein a decree of a court of record of a sister State which
58 cannot constitutionally be impeached, directly or collaterally, in the courts of this State.

Third. Said decree, being the judgment of a court of record of a sister State, is binding upon the supreme court of the said State of Wisconsin and all inferior courts of this State, including this said court and in this said cause as to the matters therein set forth, and it is not impeachable in this State or its courts nor in this court for any error of law of fact or of any inequity, real or supposed, in the basis made or rate of assessment upon the stockholders of said The Great Western Telegraph Company, including this said testator of defendants, or for any other grounds of defense, except the lack of jurisdiction of the court rendering said decree over the said corporation, and which lack of jurisdiction does not herein appear. The plaintiff relies as the grounds of its said objections in this court and in all other courts to which it has a constitutional right of resort to correct the errors of this court or of the supreme court of Wisconsin upon section 1 of article IV of the Constitution of the United States, which provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

And upon that part of section 11 of said article IV of the Constitution of the United States which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, and upon that provision of article V of the amendments to the said Constitution which declares that no person shall be deprived of property without due process of law.

59 And upon that provision of article XIV of the amendments to the said Constitution which declares that no State shall deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

The plaintiff therefore declines to amend its complaint, and respectfully insists upon its constitutional right to proceed to trial and to prove said judgment or decree as a valid cause of action in connection with the contract of subscription of defendants' testator and the ownership of stock in said The Great Western Telegraph Company and its demand for payment and the refusal thereof, and also each and every of the said matters alleged in its said complaint.

SHEPARD & SHEPARD,
Plaintiff's Attorneys.

60 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *vs.* Barbara Burnham *et al.*, as exec'rs, &c., of George Burnham, deceased. Refusal to amend complaint. Affidavit and notice of motion. Shepard & Shepard, plaintiff's attorneys. Service of within paper is admitted

this Feb. 23, 1892. Quarles, Spence & Quarles, att'ys for defendants. Filed Mar. 18, 1892. Ignatz Czerwinski, clerk.

61 And afterwards, to wit, on the 2nd day of April, A. D. 1892, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and in said cause and entered of record, to wit:

62 Circuit Court, Milwaukee County.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
vs.
BARBARA BURNHAM, CHAS. T. BURNHAM, and JOHN Q. BURNHAM, as Executors of the Last Will and Testament of George Burnham, Deceased, Defendants.

Of the regular March term, 1892, of said court, to wit, April 2, A. D. 1892.

Present: Honorable D. H. Johnson, judge of said court.

The demurrer of the above-named defendants to the complaint of the above-named plaintiff in the above-entitled action having been, on the 2nd day of November, 1889, overruled by this court, and an order overruling same duly entered and served, and from the said order an appeal having been taken by the defendants to the supreme court of the State of Wisconsin, and the said court, on or about the 16th day of December, 1890, having reversed the order of this court overruling the said demurrer, and having remitted the said action to this court with directions to sustain the said demurrer and for further proceedings according to law, and thereupon, the plaintiff having duly filed and submitted a motion and argument for rehearing therein, and the defendants having submitted an argument in opposition thereto, and the same having been taken under consideration by said supreme court, and on February 24, 1891, the said motion for rehearing having been denied by the said supreme court and costs having been taxed by defendants in said supreme court on
63 March 2, 1891, upon such motion for rehearing, and the defendants having thereafter *having* failed to pay the clerk's fees in the supreme court and to cause the record to be remitted to the circuit court of Milwaukee county in accordance with the decision of said supreme court, and the plaintiff having, on or about September 3, 1891, paid the said fees and caused the record in said action to be duly remitted to this court, and the said plaintiff having thereafter, on the 23rd day of February, 1892, moved for further proceedings in this action in accordance with the mandate and opinion of the said supreme court herein and in accordance with the statutes in such cases made and provided, and the said plaintiff having refused and refusing to amend its complaint herein, and said plaintiff now here insisting that the said complaint states a valid and sufficient cause of action—

And the said defendants having filed proof of the failure of said plaintiff to file or serve any amended complaint herein, and having, on the 26th day of February, 1892, moved for judgment dismissing

the said complaint of said plaintiff, and for costs, and the said motion of the plaintiff for further proceedings and of the defendants for such dismissal having duly come on to be heard and the court being fully advised thereof:

Now, therefore, it is ordered by the court that the demurrer of the defendants to the complaint of the plaintiff be, and it is
64 hereby, sustained in respect to the second ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action, because it does not appear upon the face of the said complaint that a valid or legal assessment was made upon the stockholders, and that the said assessment appears by the said complaint to be unequal and unjust.

And that judgment be entered in the above-entitled action dismissing the complaint therein and in favor of the above-named defendants, for their costs and disbursements of this action to be taxed.

Dated April 2d, A. D. 1892.

By the court:

D. H. JOHNSON,
Circuit Judge.

65 [Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company *vs.* B. Burnham *et al.* Order for judgment. Shepard, Haring & Frost, plaintiff's attorneys. Filed Apr. 2, 1892. I. Czerwinski, clerk.

66 And afterwards and on the same day, to wit, the 2nd day of April, A. D. 1892, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and in said cause and entered of record, to wit:

67 Circuit Court, Milwaukee County, of the Regular March Term, 1892, of said Court, to wit, April 2, A. D. 1892.

Present: Honorable D. H. Johnson, judge of said court.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNham, as Executors of the Last Will and Testament of George Burnham, Deceased, Defendants.

The demurrer of the above-named defendants to the complaint of the above-named plaintiff in the above-entitled action having been on the 2nd day of November, A. D. 1889, overruled by this court, and the supreme court of the State of Wisconsin having, on appeal from the said order, on the 16th day of December, A. D. 1890, reversed the said order of this court overruling the said demurrer and remitted the said action to this court with directions to sustain the said demurrer and for further proceedings according to law, and the record in said action having been duly remitted and the said plaintiff having moved for further proceedings in this action in accord-

ance with the mandate and opinion of the said supreme court herein and in accordance with the statutes in such cases made and provided, notice of which motion was served on the 23d day of February, A. D. 1892, and the said plaintiff having refused and refusing to amend its said complaint herein, and said plaintiff now here insisting that the said complaint states a valid and sufficient cause of action;

And the said defendants having filed proof of the failure of
68 said plaintiff to file or serve any amended complaint herein, and having duly moved for judgment dismissing the said complaint of said plaintiff and for costs:

Now, therefore, it is ordered by the court now here that Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, do have and recover of and from the said plaintiff, The Great Western Telegraph Company, their costs and disbursements of this action, taxed at thirty-one $\frac{70}{100}$ dollars, and that they have execution therefor.

Witness Honorable D. H. Johnson, judge of the second judicial circuit of Wisconsin, at Milwaukee, this 2nd day of April, A. D. 1892.

IGNATZ CZERWINSKI, *Clerk.*

Statement.

Judgment docketed April 2, 1892, at 10.20 a. m.
Costs, $31.70.

[Endorsed:] 10672. Circuit court, Milwaukee county. The Great Western Telegraph Company, plaintiff, *vs.* Barbara Burnham *et als.* as ex'c't'rs, defendants. Judgment. Filed Apr. 2, 1892. Ignatz Czerwinski, clerk.

69 In the Supreme Court of the State of Wisconsin.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC., Plaintiff and Respondent,

vs.

BARBARA BURNHAM, CHAS. T. BURNHAM, and JOHN Q. BURNHAM, as Executors of the Last Will and Testament of George Burnham, Deceased, Defendants and Appellants.

To the chief justice of the supreme court of Wisconsin:

Your petitioners, the said The Great Western Telegraph Company, and also Frank A. Helmer, the present receiver of said company, and who, petitioners represent, is the successor as such of the late Elias R. Bowen, who has died subsequent to the commencement of said cause, all of the State of Illinois, respectfully represent unto your honor that a final judgment was entered by the supreme court of the State of Wisconsin on the 16th day of
70 December, A. D. 1890, in the said cause therein pending and wherein the said Barbara Burnham and others, as executors,

etc., were appellants and the said The Great Western Telegraph Company, one of your petitioners, was respondent, and by which judgment your petitioners believe that injustice has been done to said company and also to him, said Helmer, one of your petitioners, as its receiver.

And your petitioners represent that said cause was originally commenced in the circuit court of Milwaukee county, in the State of Wisconsin, to recover a debt claimed to be due said company from George Burnham, against whom this said cause was originally commenced, as a stockholder of said company, being the amount of an assessment called for and ordered to be paid by him by a certain order or decree of assessment rendered by the circuit court of Cook county, in the State of Illinois, on the 10th day of July, A. D. 1886, in a certain cause then and therein and now pending and undetermined on the chancery side thereof, and wherein one Jeremiah Terwilliger and certain other persons, all of whom were and are
71 stockholders of said company and suing therein on behalf of themselves and all others similarly situated, were and are complainants, and wherein one of your petitioners, the said The Great Western Telegraph Company, together with certain other persons, was and is a defendant, and wherein said company had been duly served with process and had appeared by counsel, and wherein also, in the year A. D. 1874 and with the consent of said company, a receiver for it had been duly appointed; that at the time said cause was commenced in said circuit court of Milwaukee county, Wisconsin, said decree of assessment was unreversed and was in full force and effect; that it ordered the said George Burnham, or in case of his death his executors, the said appellants, to pay the amount of $875.00 to and upon the demand of the then receiver of said Company, to wit, the said Elias R. Bowen, as such receiver; that previous to the commencement of said cause in said circuit court of Milwaukee county against the said George Burnham,
72 during his lifetime, the said Elias R. Bowen, as such receiver, had demanded said sum from said George Burnham, according to said order, but *to* which demand he, the said George Burnham, had failed and refused to comply; that soon after said cause was commenced the said defendant, George Burnham, died, whereupon the same was revived against said Barbara Burnham and others as the executors of the last will and testament of him, the said George Burnham, as by law provided, being the said appellants; that in said cause in said circuit court your petitioner, the said company, filed its certain petition and complaint, wherein it set forth that it was a corporation organized and existing under the laws of Illinois, and that the said George Burnham was a stockholder of said company to the amount of one hundred shares of its stock of the par value of $25.00 each share, and that he had paid thereon the sum of only $10.00 on each and every share thereof, or a sum total of only $1,000, and that there was an unpaid balance on
73 and before said July 10th, 1886, and at the time of rendering said decree of $15.00 upon each and every share thereof, or the total amount of $1,500; that a demand had been made upon

him for the payment of the amount due from him according to said decree of assessment, to which he had not complied, and therein also setting forth the contract of subscription of said George Burnham, and also therein in substance setting forth the said decree of assessment and also praying judgment therein for the amount ordered by the said circuit court of Illinois to be paid by the said George Burnham as such stockholder or by his said executors, together with interest and costs; all of which is duly set forth in said complaint and in the record of said cause and in the abstract of such record, and to which for greater certainty your petitioners here refer.

Your petitioners further represent that afterwards the said appellants filed in said cause in said circuit court of Milwaukee
74 county their demurrer to said complaint, and which demurrer is duly set forth in the record of said cause, and to which your petitioners refer for greater certainty, and wherein, among other causes of demurrer, the said appellants set forth that the said complaint did not and does not state facts sufficient to constitute a cause of action either against the said George Burnham or against them as such executors; that afterwards the said demurrer was overruled by the order of said circuit court made and entered in said cause on the 2d day of November, A. D. 1889, and from which order overruling the said demurrer the said appellants appealed to the supreme court of Wisconsin, and at the August term, A. D. 1890, of said supreme court, and on, to wit, the 16th day of December, A. D. 1890, the said supreme court reversed the said order and judgment of said circuit court, overruling the said demurrer, and in and by its said judgment remitted the said cause to the said circuit court with directions to sustain said demurrer and for
75 further proceedings according to law; that thereupon your petitioner-, the said company, petitioned said supreme court of Wisconsin for a rehearing of said cause, which petition at the January term, A. D. 1891 thereof, to wit, on the 24th day of February, A. D. 1891, was denied.

Your petitioners further show that afterwards, the said cause having been remitted to said circuit court, the said company moved therein for further proceedings according to law, and at the same time of said motion represented and stated to said circuit court that it, the said company, refused to amend its said complaint therein, and that it would not amend the same; that thereupon the said appellants moved said circuit court for a judgment therein dismissing the said complaint at the costs of said company; whereupon the said circuit court granted the motion of appellants so made as aforesaid, and did, on the 2d day of April, A. D. 1892, and at the term thereof and in accordance with the said mandate,
76 opinion, and direction of said supreme court, make and enter a final judgment in said cause sustaining the said demurrer of appellant and dismissing said cause and the complaint therein at the costs of said company.

Your petitioners show that the principal questions in said cause were whether the said decree of assessment, as set forth in said com-

plaint, was conclusive upon the defendant and barred him from denying his liability under the same, and whether full faith and credit should not be given to said decree by the said circuit court of Milwaukee county to the exclusion of the defence either that the said decree was inequitable as to said George Burnham or his said executors or was otherwise invalid and not binding upon them or either of them.

And your petitioners show that said company claimed in
77 said cause and therein insisted, both in said circuit court and in said supreme court, that said courts should decide said questions affirmatively, and therein insisted and claimed that, under the Constitution and laws of the United States, said decree of assessment and the said complaint which set forth the said decree sufficiently and conclusively stated and set forth the liability of appellants as therein claimed, and the said company's right to recover therein, and a good and sufficient cause of action against appellants, and that the said demurrer and the causes therein set forth and contained were not well taken and were insufficient and stated no valid objections or defences to the said complaint or defects therein or which were available to appellants therein; but your petitioners show that the said supreme court of Wisconsin and also the said circuit court of Milwaukee county, Wisconsin, in
78 pursuance of the direction of said supreme court, held in said cause, against and notwithstanding the said claims of said company, that the said complaint did not state a course of action or ground for recovery against appellants, and that the said decree was inequitable and not binding or conclusive on appellants and created no just or valid claim or liability, either against said George Burnham previous to his decease or upon and against appellants, as such executors, and petitioners refer to the opinion of said supreme court in said cause where the said holding and decision of said supreme court doth fully and at large appear; and your petitioners show that the said circuit court and the said supreme court of Wisconsin did therein and thereby refuse and omit to give to the said decree of assessment as set forth in said complaint that full faith and credit to which it was entitled in the said courts of
79 Wisconsin in said cause, as provided and guaranteed by the Constitution and the statutes of the United States of America, and especially therein and thereby violated and disregarded section I of article IV of the Constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" also that part of section II of article IV of the Constitution of the United States which provides "that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States;" also that provision of article V of the amendments to said Constitution which declares that no person shall be deprived of property without due process of law; also that provision of article XIV of the amendments to the said Constitution which declares that "no State shall deprive any person of life, lib-

erty, or property without due process of law, nor deny to any
80 person within its jurisdiction the equal protection of its laws;" all of which the said company therein claimed and insisted that said courts and each of them should not do, and so your petitioners and each of them represent that the said company had in said cause rights, privileges, or immunities under said Constitution of the United States and the statutes of the United States made in pursuance thereof which were denied to it by the said judgment and decision of said supreme court of Wisconsin and by the said judgment and decision of said circuit court of Milwaukee county, Wisconsin; and, as said supreme court is the highest court in which a decision can be had in said suit, your petitioners represent that under and in accordance with the provisions of the statutes of the United States in that behalf the said company is entitled to have said decision of reversal by the said supreme court of the
81 State of Wisconsin and the said judgment and decision of said circuit court made in pursuance thereof reviewed by the Supreme Court of the United — by writ of error.

Your petitioners therefore pray that a writ of error to operate as a supersedeas to said judgment of reversal and said judgment of dismissal may be allowed to have said records and proceedings in said cause reviewed by the Supreme Court of the United States at Washington, in accordance with the statutes in such case made and provided; and your petitioners will ever pray, etc.

June 13th, A. D. 1892.

GREAT WESTERN TELEGRAPH COMPANY,
By FRANK A. HELMER, *Present Receiver*,
And FRANK A. HELMER,
Receiver of the Great Western Telegraph Company,
Successor to Elias R. Bowen, Former Receiver.

SHEPARD, HARING AND FROST AND
THOMAS J. SUTHERLAND,
Attorneys for the Petitioners.

82 The prayer of the foregoing petition is hereby allowed; bond in the sum of five hundred dollars to be approved and filed.

August 9, 1892.

WM. P. LYON,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] The Great Western Telegraph Company *vs.* Barbara Burnham *et al.* Petition for writ of error.

83 THE UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

The President of the United States of America to the judge of the circuit court of Milwaukee county in and for the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition

of the judgment in a plea which is before you in said circuit court, between The Great Western Telegraph Company, plaintiff in error, and Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, defendants in error, wherein was claimed certain title, right, privilege, or immunity under the Constitution of the United States, and that the decision of said court was against said right, title, privilege, or immunity so set up and claimed, and that therein and thereby a manifest error hath happened to the great damage of the said Great Western Telegraph Company, as by its complaint appears, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof and in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Milwaukee, Wisconsin, this the eleventh day of August, A. D. 1892, and of the Independ-
84 ence of the United States the one hundred and seventeenth year.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ,
Clerk U. S. Circuit Court for Eastern District of Wisconsin.

The foregoing writ is allowed by me.

WM. P. LYON,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] Writ.

85 Know all men by these presents that we, the Great Western Telegraph Company of the State of Illinois and H. H. Camp and F. G. Bigelow, both of the city and county of Milwaukee and State of Wisconsin, are held and firmly bound unto Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, in the penal sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 12th day of July, A. D. 1892.

The condition of this obligation is such that whereas in a certain cause which was commenced and pending in the circuit court of

Milwaukee county, in the State of Wisconsin, and wherein the said The Great Western Telegraph Company of the State of Illinois was the plaintiff and the said Barbara Burnham and others, as such executors as aforesaid, were defendants, the said court did, on the second (2nd) day of November, A. D. 1889, make and enter an order overruling the demurrer of said defendants to the complaint filed in said cause, and from which order said defendants took an appeal to the supreme court of Wisconsin, and which supreme court did, on the 16th day December, A. D. 1890, render a judgment therein in favor of the said defendants for costs of said appeal and reversing the order of said circuit court, and did also therein and thereby remand said cause to said circuit court, with directions that said circuit court should make an order sustaining the said demurrer and take further proceedings therein according to law; that thereafter, said cause having been duly remanded to said circuit court, that court did, on, to wit, the 2nd day of April, A. D. 1892, and in pursuance of the order and directions of said supreme court, sustain said demurrer and make and enter a judgment in said cause dismissing the same and the said complaint therein at the costs of said company;

And whereas the above-named plaintiff, The Great Western
86 Telegraph Company, has sued out a writ of error from the Supreme Court of the United States to reverse the said judgment of the said supreme court of Wisconsin and the said judgment of said circuit court of Milwaukee county made in pursuance thereof in said cause:

Now, therefore, if the above-named plaintiff, The Great Western Telegraph Company, shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE GREAT WESTERN TELEGRAPH COMPANY,
By FRANK A. HELMER, [SEAL.]
Its Receiver.
H. H. CAMP. [SEAL.]
F. G. BIGELOW. [SEAL.]

STATE OF WISCONSIN, } ss:
Milwaukee County, }

H. H. Camp, being duly sworn, says that he is one of the subscribers to the foregoing undertaking; that he is a resident and freeholder within the State of Wisconsin and is worth the sum of $1,000 over and above all his debts and liabilities and property within the State of Wisconsin not by law exempt from execution.

H. H. CAMP.

Subscribed and sworn to before me this 12th day of July, A. D. 1892.

[Seal Edward W. Frost, Notary Public, Milwaukee County, Wis.]

EDWARD W. FROST.
Notary Public, Milwaukee County, Wis.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

F. G. Bigelow, being duly sworn, says that he is one of the subscribers to the foregoing undertaking; that he is a resident and freeholder within the State of Wisconsin, and is worth the
87 sum of $1,000 over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

F. G. BIGELOW.

Subscribed and sworn to before me this 12th day of July, A. D. 1892.

[Seal Edward W. Frost, Notary Public, Milwaukee County, Wis.]

EDWARD W. FROST,
Notary Public, Milwaukee County, Wis.

The foregoing bond is hereby approved both as to form and sufficiency of sureties this 9th August, 1892.

WM. P. LYON,
Chief Justice of the Supreme Court of Wisconsin.

[Endorsed:] Circuit court, Milwaukee Co. The Great
88 Western Telegraph Company *vs.* Barbara Burnham *et al.*, as exec'rs, &c., of George Burnham, dec'd. Undertaking on writ of error. Shepard, Haring & Frost, plaintiff's attorneys, 86 and 87 New Insurance building, Milwaukee.

89 UNITED STATES OF AMERICA, } ss:
District of Wisconsin, }

To Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of Milwaukee county, in the State of Wisconsin, wherein The Great Western Telegraph Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William P. Lyon, chief justice of
90 the supreme court of Wisconsin, this the 13th day of August, A. D. 1892.

WM. P. LYON,
Chief Justice of the Supreme Court of Wisconsin.

We hereby acknowledge service of the within citation this the 19th day of August, A. D. 1892, on the defendants in error, Barbara

Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, and hereby enter our appearance for said defendants in error in said cause.

QUARLES, SACREE & QUARLES,
Att'ys for Def'ts in Error.

91 THE GREAT WESTERN TELEGRAPH COMPANY, Respondent,
vs.
BARBARA BURNHAM *et al.*, as Executors, etc., Appellants.

COLE, *C. J.:*

This action was brought against George Burnham in his lifetime, and, after his death, was revived against the executors of his will. The action is upon a contract of subscription to the capital stock of the plaintiff corporation. It appears from the complaint that Burnham, in May, 1869, subscribed for and agreed to take 100 shares of the capital stock and pay for the same as follows: 5 per cent. of the par value down and the balance of the par value, to wit, $25 upon each share so subscribed for, from time to time as the directors of the corporation should order. Burnham has paid 40 per cent. or $10 on each share subscribed for, leaving 60 per cent. or $15 on each share unpaid. The complaint alleges that a large number of other persons besides Burnham also subscribed for the capital stock to the extent and amount of all the shares into which the capital stock was divided upon agreements similar in all respects to Burnham's agreement. It is further stated in the complaint that in November, 1869, a suit was commenced in the circuit court of Cook county, Illinois, wherein one Terwilliger, a stockholder, was plaintiff in behalf of himself and other stockholders similarly situated, against the plaintiff corporation and other defendants, which suit is still pending and undetermined. The corporation appeared in that action and submitted to the jurisdiction of the court. In the proceedings therein taken the court, among other things, took control of the powers
92 and property of the corporation, appointed a receiver, with the usual powers of a receiver, to take charge of the affairs of the corporation, manage its business, collect the assets, and pay the debts of the corporation. It is alleged that in July, 1886, the corporation was justly indebted to sundry persons in a large amount, namely, in the sum of $400,000, the whole of which indebtedness accrued against the company after Burnham entered into his contract of subscription, and that the corporation has no property, except the amounts unpaid upon the shares of the capital stock, to pay or meet this indebtedness; that the unpaid shares are largely in excess of said indebtedness; and it is further alleged that before said last-named date a small number of its stockholders had paid to the plaintiff $25 on each of its shares of stock subscribed for by them respectively, being the par value and in full of the same; that none of the remainder of said stockholders and subscribers had before said last-named date, nor have any of them now, paid more

than $10 upon each of the shares of the capital stock severally subscribed for or held by them; that many of them have never paid more than 50 cents upon each of such shares severally subscribed for by them, and there was, on said last-named date, a balance and amount unpaid upon each of the shares of each of the capital stock (except those which had been paid for in full, as aforesaid), including those subscribed for by the defendant Burnham, of not less than $15, which the stockholders are severally liable to pay, when called upon and ordered to pay, according to the terms of their several agreements of subscription, and that the stockholders have been ordered to contribute 35 per cent. of the par value of the shares of stock subscribed for, to be used and applied to the payment of the indebtedness of the corporation and of the expenses of the receiver incurred in and about its affairs. The corporation brings this suit to recover this 35 per cent. as-
93 sessment or call upon the stock purchased by Mr. Burnham.

A number of objections were taken by way of demurrer to the complaint in the circuit court, which were ably discussed on the oral argument at this bar. From the view which we have taken of the complaint we do not deem it necessary to consider all these points. We shall assume, for the purposes of this appeal, without deciding other points, that the action may be prosecuted in the name of the corporation, even after the appointment of a receiver, and ordering him to take charge and control of its property, collect its assets, and pay its debts. We will further assume that the Illinois court of equity in the suit before it, having also before it all the evidence as to the organization of the corporation, the validity of the stock subscriptions, and the liabilities of the corporation, could decree or make a call on the unpaid subscriptions to the stock in the same manner and with like effect as though the directors of the corporation themselves had ordered the assessment, as they were authorized to do by the contract of subscription, but we fully agree with the appellants' counsel that any call or assessment made upon the shares must be uniform and in ratable amounts, and that any call or assessment which requires some shareholders to pay a higher rate than other shareholders is unjust and should not be enforced. We have referred to the averment of the complaint which states that some of the stockholders have paid $10, or 40 per cent., on each share of stock held by them, while many of the stockholders have never paid more than 50 cents, or 2 per cent., on a share. It requires no argument to show that such a call or assessment on the stock is grossly unequal and unjust. We think Mr. Morawetz states the correct rule on this subject in the following language: "Justice between the shareholders of a corporation re-
quires that all the shareholders should contribute in respect
94 to their shares at the same time and in ratable amounts. A call requiring some shareholders to pay in more than others would therefore be invalid, but if some shareholders have already contributed more than others it would be not only the right but the duty of the directors to make calls upon the other shareholders in such amounts as to equalize the contributions of all." Morawetz

on Private Corporations, 2nd ed., section 154. See also Pike *v.* Shore Line, 68 Me., 445. Cook on Stock and Stockholders, 2nd ed., says: "Calls must be made on all alike or they will be void. The courts will not allow the directors of a company so to proceed as to require some stockholders to pay calls and not to require others to do the same;" and this accords with common sense and all notions of equity and fairness.

It is also objected that the assessments exceeded in amount what was needed for the payment of the debts of the corporation and the legitimate expenses of administering its affairs. We shall not go into that question at this time. Presumably the court examined into the financial condition of the corporation and determined what amount of money it was necessary to raise to meet its liabilities; but neither the court nor the directors were authorized to make an assessment so unequal and partial as the complaint shows was made in this case, and the very intelligent counsel for the plaintiff did not claim that a partial and unequal assessment was valid, but he insisted that we must presume that the assessment was equal and fair; that the stockholders, who had paid but 2 per cent. on their shares, had paid other assessments so as to equalize all the calls and make them 40 per cent. We do not see how such a presumption can be made in view of the averments in this complaint, for it is distinctly alleged that some of the stockholders have paid 40 per cent. of the par value of their shares, while many others have paid only 50 cents on each share; in other words, have paid but
95 2 per cent. on the par value of the shares. With such a state of facts, how a horizontal assessment of 35 per cent. on all the shares can be said to be uniform and just passes our comprehension. It is certainly no "forced inference" from the complaint that the assessment alleged to have been made is illegal and does not furnish a proper basis for this action, nor can the fact that the call or assessment was made by the court in the suit before it change our conclusions as to its inequality and unfairness. A court by its decree cannot make that which is essentially wrong and unjust right and just; but, it is said, we must give full faith and credit to the proceedings of the Illinois court, and that we should not presume it would make an unfair and unequal assessment; but we must take the allegations of the complaint as we find them and give them their obvious sense and meaning, and when it is stated that some of the shareholders have paid 40 per cent. of their subscriptions while others have paid but 2 per cent., and then proceeds to claim that a horizontal assessment of 35 per cent. is made on all shareholders alike, we think it fairly appears that an unequal and unjust assessment was made. We do not intend to express any definitive opinion as to the real effect of the decree of the Illinois court or as to how far it concludes the rights of shareholders who were not parties to that proceeding. Those questions are not now necessarily before us, and may be postponed until they arise. We confine our decision to the objection that the complaint shows an unlawful and illegal call or assessment upon Mr. Burnham which

should not be enforced. The demurrer to the complaint was well taken and should have been sustained.

The order of the circuit court is therefore reversed and the cause is remanded for further proceedings according to law.

96 STATE OF WISCONSIN:

Supreme Court.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the court, on file in my office, in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, the fifth day of July, A. D. 1892.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

97 [Endorsed:] State of Wisconsin, supreme court. The Great Western Telegraph Co., respondent, against Barbara Burnham *et al.*, as executors, etc., appellants. Certified copy of opinion of Cole, C. J. Fee for this copy, $2.50.

98 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the thirteenth day, of January, A. D. 1891, on the nineteenth day of the term, to wit, on the twenty-fourth day of February, A. D. 1891—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassoday, associate justices of said court—the following proceedings were had *inter alia*, to wit:

THE GREAT WESTERN TELEGRAPH COMPANY, Respondent, *vs.* BARBARA BURNHAM *et al.*, Appellants.	Appeal from Circuit Court, Milwaukee County, State of Wisconsin.

The court being now fully advised of and concerning the motion of the said respondent for a rehearing in this cause, it is now here ordered and adjudged by this court that the said motion be, and the same is hereby, denied, with $25 costs and clerk's costs of motion.

STATE OF WISCONSIN, *ss*:

Supreme Court.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and

foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom.

Seal Supreme Court of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this second day of July, A. D. 1892.

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

99 [Endorsed:] State of Wisconsin, supreme court. The Great Western Telegraph Co., respondent, against Barbara Burnham *et al.*, appellants. Certified copy of judgment on motion for rehearing.

100 To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

I, Ignatz Czerwinski, clerk of the circuit court of Milwaukee county, in the State of Wisconsin, and keeper of the records and seals thereof, do certify and return to the said annexed writ of error that the foregoing is a true and correct transcript of the record and proceedings of a cause tried and determined in said circuit court between The Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, plaintiff, and Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will and testament of George Burnham, deceased, defendants, to wit, the record whereon said cause was tried, together with the decision of said court and its final judgment therein rendered; and I further certify that the foregoing also contains a complete and true transcript of certain decisions and orders rendered and issued by the supreme court of the State of Wisconsin and heretofore filed in said cause in said circuit court, the originals of which now remain in this office and which are specifically named as follows, to wit: The decision of the said supreme court in the said cause by Orsamus Cole, chief justice of the said court; the order of the said court remitting the said case to the circuit court for Milwaukee county for further proceedings according to law; that there is also annexed and attached hereto the original certified copies of the opinion of said supreme court in said cause in said supreme court, and the order denying the petition for rehearing therein in said supreme court.

And I further certify that the petition for the writ of error for the removal of said cause to the Supreme Court of the United States, the writ of error, bond, and citation are attached to this transcript in original form as a part of the return to said writ, and I have retained true copies thereof and the same are lodged in my
101 office, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and the seal of said court, at Milwaukee, in the county of Milwaukee, in the State of Wisconsin, this the 20th day of August, A. D. 1892.

[Seal Circuit Court, Milwaukee Co., Wisconsin.]

IGNATZ CZERWINSKI,
Clerk Circuit Court, Milwaukee County, Wis.

102 *Assignment of Errors.*

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, October Term, A. D. 1892.

THE GREAT WESTERN TELEGRAPH COMPANY, Plaintiff in Error,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, and JOHN Q. BURNham, as Executors of the Last Will and Testament of George Burnham, Deceased, Defendants in Error.

In error to the circuit court of Milwaukee county, in the State of Wisconsin.

And now comes the said Great Western Telegraph Company, plaintiff in error in the above-entitled cause, by Edward Roby, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The said circuit court of Milwaukee county, of the State of Wisconsin, erred in rendering judgment in said cause sustaining the said demurrer of the said defendants to the said complaint and rendering judgment therein dismissing the said complaint at
103 plaintiff's cost and against the plaintiff for costs (and which was done in pursuance of the opinion and decision, order and direction, of the supreme court of Wisconsin duly made and entered in said cause), and therein and thereby holding and deciding that the said decree of assessment of the circuit court of Cook county, Illinois, and the said demand made upon the said George Burnham, the original defendant in said cause, under and in pursuance of the said decree, together with the said contract of subscription of the said George Burnham, and as set forth and referred to in said complaint did not constitute a valid cause of action against the said original defendant before his death or against the said defendants as the executors of his last will and testament, and that the said complaint did not set out and contain the statement of a valid cause of action against them, and, further, that the said supreme court of Wisconsin erred in holding and deciding that the said complaint did not state a valid cause of action against the said defendants; that therein and thereby the said supreme court and the said circuit court of Milwaukee county, by their said several hold-
104 ings, decisions, and judgments, denied to the said decree of assessment that full faith and credit to which it was entitled in said cause under and by virtue of the Constitution and the laws of the United States.

2d. That the said circuit court of Milwaukee county and the said supreme court of Wisconsin each committed error in this, that they did each, in and by their said several decisions and judgments, erroneously hold and decide that the said decree of assessment, together with the said contract and the said demand as set out and

declared in said complaint, did not create a right of action in said cause in favor of the said plaintiff and against the said defendants, and that the said decree of assessment was not conclusive in said cause to establish the liability of said defendants to pay the plaintiff according to its terms, or to pay the plaintiff any sum or sums of money whatsoever.

3d. And the said circuit court of Milwaukee county and said supreme court, in and by their said several judgments, decis-
105 ions, and holdings, committed error in that they severally therein and thereby refused and omitted to give and extend to the said decree of assessment in said cause the same faith and credit to which it was at the time said cause was commenced and has at all times subsequent to the making and entering thereof been entitled to and has received in all the courts of the State of Illinois in all actions or proceedings commenced or conducted therein and under said decree and against the stockholders of the said plaintiff, and to enforce the collections and payments therein and thereby ordered and otherwise, and in therefore therein holding and deciding that the said defense of said defendants as in their said demurrer set forth, namely, that the said complaint did not state facts sufficient to constitute a cause of action, was valid, because it did not appear in and by said complaint that a valid or legal assessment was ever made upon the stockholders of the plaintiff, including said George Burnham, or the said defendants, and that
106 by the said complaint the said assessment appeared to be unequal and unjust.

4th. The said circuit court of Milwaukee county and also the said supreme court of Wisconsin in and by their said several opinions, holdings, decisions, and judgments committed error in this, that therein and thereby they each refused and omitted to allow therein the full faith and credit to the said decree of assessment set forth in said complaint, to which it was therein entitled under the Constitution and the laws of the United States and especially as provided and vouchsafed by section I of article IV of said Constitution, and by reason thereof entered judgments therein in favor of said defendants and against the plaintiff for costs.

5th. The said circuit court of Milwaukee county erred in sustaining the said demurrer and in rendering judgment dismissing the said complaint and said action, at the plaintiff's costs, and in rendering judgment therein against plaintiff for costs of suit, because said judgment and decisions by said circuit court were each
107 made and were in disregard of and in violation of the Constitution of the United States and the laws thereof and especially of that provision of the said Constitution known as and being section I of article IV thereof.

6th. The said circuit court of Milwaukee county, as well as the said supreme court of Wisconsin, erred in and by its said holdings, decisions, and judgments and each of them in said cause and wherein the question as to what faith and credit should be given and extended in said cause to the said decree of assessment was a direct issue and by which it violated and disregarded the Constitution and

the laws of the United States and especially section I of article IV of said Constitution.

7th. The said circuit court of Milwaukee county erred in rendering judgment against the plaintiff in error herein and in dismissing said complaint, as it thereby unlawfully deprived the plaintiff of the benefit of said decree of assessment, which constituted and
108 was the basis and vital element of his cause of action; and the said supreme court of Wisconsin also erred in its said opinion and decision and wherein it decided that the said complaint did not state a good and sufficient cause of action, and that the said decree of assessment was not binding and conclusive upon the defendants in said cause, and in ordering and directing the said circuit court of Milwaukee county to sustain the said demurrer and to take further proceedings according to law, being in substance to dismiss the said complaint and action, if not amended, and in also rendering judgment against the plaintiff for costs.

The said circuit court of Milwaukee county, in and by its said judgment, whereby it dismissed the said complaint and
109 action at the costs of the plaintiff and therein rendered judgment against the plaintiff for costs of suit, committed error, forasmuch as therein and thereby it violated and disregarded the Constitution of the United States and the several provisions thereof as follows, viz., section I of article IV of said Constitution; section II of article IV of said Constitution; also article XIV of the amendments to said Constitution, and denied to the plaintiff rights, privileges, and immunities to which it was justly entitled under each and every of the said provisions and the laws of the United States in force for the enforcement of the same, and the said supreme court of Wisconsin, in and by its said opinion, decision, and judgment, equally violated the said provisions of said Constitution and denied to the plaintiff the rights, privileges, and immunities to which under the same in said cause it was entitled.

Wherefore the plaintiff in error prays that the said action and judgments of said circuit court of Milwaukee county, Wisconsin, be reversed, and that the said action and judgments also of said supreme court of Wisconsin be reversed, etc.

EDWARD ROBY,
Counsel for Plaintiff in Error.

Endorsed on cover: Case No. 15,128. Wisconsin, Milwaukee county, circuit court. Term No., 1158. The Great Western Telegraph Company, plaintiff in error, *vs.* Barbara Burnham, Charles T. Burnham, and John Q. Burnham, as executors of the last will & testament of George Burnham, deceased. Filed September 8th, 1892.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED,
Defendants in Error.

No. ~~805~~ 159

Error to the Circuit Court of Milwaukee County, State of Wisconsin.

Motion to Advance.

The plaintiff in error, The Great Western Telegraph Company, ~~by Edward Roby, its attorney and counsel,~~ comes and now here moves the court to advance this cause, and set it down for argument at an early convenient day, and respectfully shows to the court the following *special and peculiar reasons and circumstances*, as the grounds of this motion:

The question presented in this cause is the right in the Supreme Court of Wisconsin, and the Circuit Court of Milwaukee County, Wisconsin, in this suit, to have full faith and credit given to the decree of assessment of the Circuit

Court of Cook County, Illinois (Rec. 2–7) made and entered by said court, on the tenth day of July, A. D. 1886, in the chancery cause of *Jeremiah Terwilliger et al.* v. *The Great Western Telegraph Company et al.*, and also, as a necessary consequence, in all suits that may be commenced in the courts of Wisconsin against the stockholders of the plaintiff, under and in pursuance of said decree. and for the enforcement of its terms; and also as to the right of said decree to receive, in this suit and other similar suits in the courts of Wisconsin, the same faith and credit which it receives, and has received, since it was made in the courts of Illinois. (See *Great Western Telegraph Company* v. *Gray*, 122 Ill. 630.)

The sole question determined in this suit in the Supreme Court of Wisconsin and the said Circuit Court of Milwaukee County, Wisconsin, was, as to the force and effect of the said decree of assessment in creating a liability upon the defendants and a cause of action against them; and the sole ground of the decision of the said Supreme Court, reversing the judgment of the said Circuit Court of Milwaukee County, was its holding that said decree was not conclusive upon the defendants in the courts of Wisconsin, and did not create any liability on their part to pay, according to its terms (Rec. 30–3; See 79 Wis. 47), notwithstanding the decision of the Supreme Court of Illinois, affirming the validity and conclusiveness of such decree; (*G. W. Tel. Co.* v. *Gray*, 122 Ill. 630) and the Supreme Court of Wisconsin, denying the conclusiveness of said decree and refusing to give it that "full faith and credit" accorded thereto by the Supreme Court of Illinois, held that, notwithstanding the said Illinois Court of Chancery had full jurisdiction of the subject-matter, and of the person of the plaintiff corporation, and full power to make a decree of assessment in said cause of *Terwilliger et al.* v. *The Great Western Telegraph Company et al.*, yet, that because the said decree was, in its opinion, "*partial and unequal*," that it was therefore *invalid* and not conclusive and binding upon the defendants in this law action, brought under and in pursuance of it.

The cause involves the interests of several thousands of

persons, resident in divers States and jurisdictions of the United States, (being the creditors and stockholders of the plaintiff) and of the gravest character. The said creditors whose claims were duly adjudicated in the said chancery cause in the Illinois court, are obliged to await payment through the action of the court in that cause. Such claims with interest, now amount to the sum of more than *five hundred thousand* dollars.

At the time of the making of the said decree, the stockholders or their representatives, to the number of over 1,000, resided in the State of Illinois, the domicile of the plaintiff; over 300 in the State of Wisconsin, upon whose subscriptions more than $200,000 were due and unpaid; over 500 in Iowa, and upon whose subscriptions more than $300,000 were due and unpaid; about 500 in Kansas, upon whose subscriptions nearly $500,000 were due and unpaid; nearly 200 in Nebraska, and upon whose subscriptions about $150,000 were due and unpaid; nearly 100 in Indiana, upon whose subscriptions about $100,000 were due and unpaid; nearly 500 in Missouri, upon whose subscriptions about $350,000 were due and unpaid; while the balance of the stockholders resided in more than seventeen different states, and other places.

By reason of the fact that the subscriptions to the stock were made in the years 1868 to 1871, and the long delay, a large number of the stockholders either died or became insolvent before the making of the decree of assessment; and subsequently thereto, the mortality among them has largely increased, and the difficulty of collecting sufficient from them under said decree to pay the debts, has consequently been greatly augmented.

Because, also, of the said opinion and decision of the Supreme Court of Wisconsin (Nov. 16, 1890), now before this court herein for review, and the rendering of an opinion of a similar character, by the Supreme Court of Iowa, some months subsequent thereto (Oct. 15, 1891) in *Great Western Tel. Co.* v. *Purdy*, (83 Ia. 430,) also removed to this court, and now pending herein, as Number 728, the receiver of

the plaintiff has been prevented from commencing any other suits, in Wisconsin or in Iowa, or in the other of said States without the State of Illinois, and has therefore not been able to enforce collections under said decree, from the said stockholders, resident in those States, to the great loss and damage to the estate of plaintiff, and its creditors; and it is impossible for the said receiver to make any effort to enforce collections from such stockholders without the State of Illinois, until the court has decided this cause, and the said cause of this plaintiff against Purdy.

That the demands under said decree were made by the said receiver upon the stockholders outside of Illinois, in the years 1886, 1887 and 1888, and the statute of limitations is likely to bar proceedings for collections in those States in a short time, unless the said receiver is permitted to undertake the same at an early day. That by reason of the said decision of the Supreme Court of Wisconsin, and the consequent interference thereby, with the collections in that State, the loss therein to the plaintiff and its creditors, in connection with the liability of the stockholders residing in that State, has been not less than the sum of about $40,000, while the loss occasioned thereby, and also by the said decision of the Supreme Court of Iowa, in the other States named, by reason of the plaintiff's inability to make collections there, as aforesaid, has been correspondingly large, so that the rendering of those decisions has inflicted an irreparable injury to the plaintiff and its creditors, and such injury will be constantly increased while they shall remain unreversed.

Said decisions have also greatly injured the rights of the large body of the stockholders of the plaintiff residing in *Illinois*, against whom only, the receiver of the plaintiff is now able to enforce collections under said decree, and who are thus forced to discharge a responsibility, from which the others of said stockholders are shielded by the said decisions.

This cause also involves the right of a corporation organized under the laws of the sovereign State of Illinois, to pursue in other States, the trust funds in the possession of

its stockholders there residing;—being the unpaid stock subscriptions. It also involves considerations of the gravest character in this, that it involves the right to have respected and enforced in the said Supreme Court of Wisconsin, and in said Circuit Court of Milwaukee County, in this suit, section 1 of article IV of the Constitution of the United States, and the laws of Congress in relation thereto.

It also involves the rights and liabilities of a large body of persons, *as* a "*class.*" The position and difficulty of the plaintiff, and its receiver is now practically the same that it would be, if actions were already pending against all of its stockholders in the States of Iowa and Wisconsin, and in the other States outside of Illinois, and which, of course, could not safely be proceeded with until the said decisions, now before this court, were reviewed, and the extent of "faith and credit," to which the said decree of assessment of the Illinois Chancery Court is entitled, should be thus determined. The *principle* seems identical, as in the present instance, the plaintiff is ready to begin the actions at law; and the only difference in the two conditions being the extra expenditure of some court costs, and the labor necessary for the actual commencement of the cases. (See *Hoge* v. *R. R. Co.*, 3 Otto 2–3.)

The plaintiff's interests, therefore, and those of its said stockholders in Illinois, and also, those of its creditors, will be irremediably injured if this cause is compelled to await before hearing can be had, its turn, in the regular call of causes upon the docket of this court.

Wherefore the plaintiff prays that its said cause and writ of error may be advanced.

Plaintiff also prays that this cause be argued and heard together with the cause of *The Great Western Telegraph Company* v. *Hiram Purdy*, now pending in this court, as Number 728 of this term, as they involve substantially the same questions.

By Thomas J. Sutherland

~~Edward Roby,~~

Counsel for Plaintiff in Error, The Great Western Telegraph Company.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. Frank A. Helmer, being duly sworn, on oath, states that he is the receiver of the Great Western Telegraph Company, the above named plaintiff in error, having been duly appointed such, in the said case of *Jeremiah Terwilliger et al.* v. *the said company et al.*, now pending in the Circuit Court of Cook County, Illinois, and as the successor therein of Elias R. Bowen, deceased, who was the former receiver of said plaintiff; that he has read the foregoing motion and reasons therein contained and knows the contents thereof, and that the same are true as he is informed and verily believes.

FRANK A. HELMER.

Subscribed and sworn to before me this 15th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. William P. Black, being duly sworn, deposes and says, that he is the *solicitor* of the Great Western Telegraph Company, and of Frank A. Helmer, its receiver, in the cause of *Jeremiah Terwilliger et al.* v. *The Great Western Telegraph Company et al.*, now pending in the Circuit Court of Cook County, Illinois, referred to in the foregoing motion, and reasons; that he has read the foregoing motion, and reasons therein contained, of said company, the said plaintiff in error, and knows the contents thereof, and that the same are in all respects true, as he is informed and verily believes.

WILLIAM P. BLACK.

Subscribed and sworn to before me, this 16th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. Thomas J. Sutherland, being duly sworn, deposes and says that he is the attorney of Frank A. Helmer, as receiver of the great Western Telegraph Company, the plaintiff in error above named; that he was one of the attorneys for the plaintiff in the said cause of said company v. Burnham et al., in the Circuit Court of Milwaukee County, Wisconsin, and Supreme Court of Wisconsin; that he has read the foregoing motion, and reasons therein contained, and knows the contents thereof, and that the same are true, as he is informed and verily believes.

THOMAS J. SUTHERLAND,

Subscribed and sworn to before me this 14th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
BARBARA BURNHAM, CHARLES T. BURNHAM, AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED,
Defendants in Error.

TERM NO. 805.

In error to the Circuit Court of Milwaukee County, State of Wisconsin.

TO BARBARA BURNHAM AND OTHERS, THE DEFENDANTS IN SAID CAUSE, AND TO QUARLES, SPENCE AND QUARLES, THEIR COUNSEL THEREIN, MILWAUKEE, WISCONSIN:

Take notice that the plaintiff in error in said cause will, on Monday, the 19th day of March, A. D. 1894, at the opening of said court on that day, present to the justices of said Supreme Court, at the court room of said court at the city of Washington, in the District of Columbia, the foregoing motion and reasons, with affidavits attached, copies of which are herewith delivered to you, and shall then and there ask the said court to grant said motion. The said plaintiff in error, will also then and there move the said court for an order that the cause of the *Great Western Telegraph Company* v. *Hiram Purdy*, Number 728, now pending in said court, be advanced and argued and heard, together with the above entitled cause, upon the ground that they involve substantially the same questions.

Chicago, Illinois, February 17, 1894.

EDWARD ROBY,

Counsel for the Plaintiff in Error, The Great Western Telegraph Company.

JAN 18 1896
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

Term No. 159.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC.,
Plaintiff in Error,

vs.

BARBARA BURNHAM, CHARLES T. BURNHAM AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED.

In Error to the Circuit Court of Milwaukee County, State of Wisconsin.

BRIEF OF THOMAS J. SUTHERLAND, COUNSEL FOR PLAINTIFF IN ERROR.

WM. P. BLACK,
Of Counsel.

CHICAGO:
Printed by the Chicago Legal News Company.
1896.

IN THE

SUPREME COURT OF THE UNITED STATES.

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Chicago, Illinois, February 17, 1894.

EDWARD ROBY,
Counsel for the Plaintiff in Error, The Great Western Telegraph Company.

Office Supreme Court U. S.
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In Error to the Circuit Court of Milwaukee County, State of Wisconsin.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

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Plaintiff in Error

vs.

BARBARA BURNHAM, CHARLES T. BURNHAM AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED.

In Error to the Circuit Court of Milwaukee County, State of Wisconsin.

Brief of Thomas J. Sutherland, Counsel for Plaintiff in Error.

STATEMENT.

The plaintiff in error in this action, is the same as that in the case of Great Western Telegraph Company v. Purdy, No. 105, recently submitted to this court.

The present action was brought to enforce the same decree of assessment declared upon, and introduced in evidence in the Purdy case.

The only difference between the two actions is that they were brought against different stockholders of the plaintiff company in the courts of different States.

The present action was commenced by complainant in the Circuit Court of Milwaukee County, Wisconsin, against George Burnham, the defendant, since deceased, on the 8th day of October, A. D. 1888. His executors were afterward duly substituted on May 6, 1889. [Rec., 30.]

THE COMPLAINT.

The complaint [Record, 5–16], alleges that the plaintiff is an *Illinois* corporation, organized in 1867, under a law of that State enacted and in force in 1849; sets forth its capital stock of $3,000,000, in shares of the par value of $25 each, and that the defendant subscribed for, and agreed to take and pay for, 100 shares of its stock, such payment to be made according to the orders of the board of directors, and annexing as "*Exhibit A*" thereto a copy of the defendant's contract. It sets forth that the defendant had paid $10 on each share, and still owed on, and previous to July 10, 1886, an unpaid balance of $15 on each share; that others subscribed for the balance of said capital stock, by contracts similar to that of defendant, and that such other persons number several thousands, and are widely scattered, and reside in divers jurisdictions.

It sets forth that a chancery suit was begun by one Terwilliger and certain other persons, stockholders of the plaintiff, in the Circuit Court of Cook County, Illinois, in 1869, such court "being a court of record and of general legal and equitable jurisdiction;" that the plaintiff and others were therein defendants, were duly summoned, and appeared, and submitted to the jurisdiction of said court; that said suit has ever since been pending and undetermined in said court. It sets up the appointment, in that suit, of the receiver on October 7, 1874, and that such appointment has never been set aside; that the indebtedness of the plaintiff previous to July 10, 1886, was $400,000, all of which accrued subsequent to the making of the defendant's contract, and that on said last mentioned date the plaintiff had no property or assets with which to pay said indebtedness except the amounts unpaid upon the shares of its capital stock, and which unpaid amounts were largely in excess of the said indebtedness; that before said last named

date, a small number of the stockholders had paid to the plaintiff the full par value of the shares subscribed for; that none of the remainder had paid more than $10 on each share subscribed for by them respectively, and that many had never paid to exceed fifty cents upon each of the shares severally subscribed for by them, and that there was due from all of them, except the small number who had paid par, the sum of not less than $15 on each share, and which was liable to be ordered paid for the satisfaction of the plaintiff's debts, and according to the terms of said contracts of subscription. It sets forth that all of the stockholders were not made parties to said Illinois chancery suit, because it was impracticable to make them such.

It further avers that the said court, having full jurisdiction and authority in the premises, did, on July 10, 1886, render its decree of assessment. It then proceeds to recite the findings and order of such decree, which is very full, and includes a showing of jurisdiction, proof of indebtedness, non-existence of assets except unpaid balances upon the stock, and an order of assessment of thirty-five per cent of the par value, or $8.75 a share, upon all of the stockholders except those who had paid par, for the payment of the plaintiff's debts; and that such payment be made to and upon the demand of the receiver of the plaintiff, giving full power to the receiver to proceed to collect the same, taking such action and instituting such proceedings in the name of the plaintiff, in such jurisdictions, as should be deemed expedient and proper for the purpose of enforcing such payment. It sets forth, also, that the defendant, from the making of such decree, became liable to pay upon his subscription of 100 shares, the sum of $875, according to the demand of the receiver; that the receiver did, on October 7, 1887, make demand upon the defendant for the payment to him of said sum of $875, and also at the same time gave to him due notice of the making and entering of said decree; alleges noncompliance with the demand, and prays judgment against defendant for $875, with interest and costs. It will be seen that this complaint contains and brings to the Wisconsin court the substance of the decree of assessment

of the Illinois chancery court. This is the same decree which had previously (Nov. 9, 1887) been approved, and its validity sustained against all of the stockholders of the plaintiff by the Supreme Court of Illinois in *Great Western Telegraph Company* v. *Gray*, 122 Ill. 630, and which court had in that case before it the entire decree for its consideration; for on page 634 the court says: "The declaration sets forth fully the above and other requisite facts, stating particularly the proceedings in said chancery suit, *and giving a copy of the decree of assessment.*"

In fact, the attitude of the defendant *Burnham*, in this case, was precisely like that of *Gray*, in the Illinois court, and the case stated against *Burnham*, was precisely like that declared against *Gray*, and in which the Supreme Court of Illinois, held that the decree was valid and conclusive against him and created a right of action to recover the amount ordered paid; and that it equally was conclusive and created a cause of action against each and every of the stockholders wherever resident.

The defendant, Burnham, in this case, filed his special demurrer to the complaint, as shown on record, page 18, alleging: I. That the action should have been brought in the name of the receiver; II, also to the same effect; III, that the complaint does not state a cause of action; IV, the statute of limitations of Wisconsin.

The defendant thus admitted every averment of the complaint, and that it contained a correct statement of the proceedings and facts in connection with the chancery suit, and of the decree of assessment, and of the defendant's relation, including the amount paid by, and due from him.

The plaintiff thus declared upon and presented to the Wisconsin court the decree of a competent court of the sister State of Illinois, having full jurisdiction of the subject-matter and proper parties, and in an action against the defendant stockholder, who was, and is, privy to that decree.

The Circuit Court of Milwaukee County overruled the demurrer; [Rec. 23] whereupon, according to the practice in the courts of Wisconsin, the defendants appealed from the decision and judgment of the Circuit Court overruling the de-

murrer, to the Supreme Court of Wisconsin. [Rec. 39.] That court, on the 16th day of December, 1890, reversed the judgment of the Circuit Court, and rendered a judgment against the plaintiff for costs, and remanded the case to said Circuit Court "for such further proceedings therein as may be according to law." [Rec. 45.]

The final decision and opinion of the Supreme Court is found on record pages 91 to 95.

The plaintiff omitted and refused to amend its complaint; in fact, it was unable to do so, as it had already declared its *only* cause of action (including its *only decree*), and which had thus been decided not to be one by the Supreme Court.

Afterward, and on April 2, 1892, the said Circuit Court of Milwaukee County, in accordance with the said final opinion, decision and mandate of said Supreme Court, made and entered final judgment sustaining the demurrer of the defendants to the complaint, and dismissing the complaint therein, and in favor of defendants, for their costs and disbursements. [Rec. 62–68.]

According to the practice in Wisconsin, upon appeals from the Circuit Courts, the records of such courts are transmitted to the Supreme Court, and upon final decision and judgment by that court, the record is remitted to the Circuit Court. Such was the practice in this action, and when the judgment was rendered by the Circuit Court of Milwaukee County, in pursuance of the final decision of the Supreme Court, the record had been remitted to, and was in that court.

The writ of error in this case was, therefore, upon petition allowed by the chief justice of the Supreme Court of Wisconsin, and was directed to the Circuit Court of Milwaukee County, from which court the only record of the action has been transmitted to this court.

The copy of the final judgment, and remittitur in the Supreme Court, was duly filed in the Circuit Court, and is a part of the record sent to this court, and is found on pages 45–6 of such record.

It is here submitted that the final decision in this action was that of the Supreme Court of Wisconsin, and that the

Circuit Court in sustaining the demurrer of the defendants and dismissing the complaint and rendering judgment against plaintiff for costs was, under the *particular practice* in Wisconsin, merely entering the judgment of the Supreme Court. Such is the correct conclusion, as it seems to us, to be drawn from the practice and decisions of Wisconsin.

BRIEF AND ARGUMENT.

The Jurisdiction of this Court.

This case was disposed of in the Wisconsin courts, upon demurrer, and hence the decree of the Illinois chancery court, set out in the complaint, was fully and fairly averred and presented, and admitted; and the title, right, privilege or immunity in respect to the full faith and credit due to such decree, under the constitution and laws of the United States, was therefore specially therein set up and claimed, and involved in the pleadings in the case.

Texas & C. Ry. Co. v. *Southern Pacific Co.*, 137 U. S. 55.

Armstrong v. *Treasurer of Athens County*, 16 Pet. 285.

Kaukauna Co. v. *Green Bay & C. Canal*, 142 U. S. 254, 269.

Roby v. *Colehour*, 146 U. S. 153.

Dowell v. *Applegate*, 152 U. S. 327.

For the purpose of sustaining the jurisdiction of this court upon this writ of error, it is deemed important to discuss the character and effect of the proceedings in the Circuit Court of Milwaukee County, and in the Supreme Court of Wisconsin. As before stated, the plaintiff's complaint in the Circuit Court, was held to state a cause of action, and the defendant's demurrer was overruled. The plaintiff, therefore, had then nothing to except to in *that* court. Upon the defendant's appeal, the Supreme Court reversed the lower court, ordering "further proceedings therein as may be according to law," and at the same time rendered a judgment against the plaintiff for $123.25, as costs of the proceeding in that court.

The Supreme Court judgment, therefore, consisted of two parts—a judgment of reversal and a judgment for costs. It will not be questioned that the costs judgment was final, being a decision of the highest court, and to be executed through its own machinery. The writ of error is to reverse the costs judgment as well as that reversing the lower court. As to the judgment of reversal, ordering the lower court to proceed in the action "as may be according to law," it is submitted that such judgment was, in view of the peculiar practice in the courts of Wisconsin, "a final judgment * * * in the suit in the highest court of [a] the State in which a decision in the suit could be had," and fully embraced in the provisions of Section 709 of the judiciary act. We are conversant with the decisions of this court in cases where writs of error to State courts have not been sustained, when the judgments of such State courts were judgments of reversals, including orders for further proceedings.

Notwithstanding such decisions, it is believed that the present case is distinguishable, and that the judgment rendered, was final and ended the litigation, and was, in substance, an order to the lower court to enter judgment dismissing the complaint at the plaintiff costs. The question is one which the plaintiff's counsel early considered, and before suing out the writ of error. It was believed to be perilous, under the decisions of Wisconsin and this court, to take any further proceedings in the action in the Circuit Court, after the Supreme Court decision, and upon remittitur, the Circuit Court, accordingly entered judgment against the plaintiff. The real purport of the language of the Supreme Court decision is, consequently, at this point a proper subject for consideration.

The plaintiff declared upon the decree of assessment of the Illinois court, as creating its cause of action. It was its *only* decree, and in the very nature of the case it could not set out any other. Its whole case rested upon this decree. If the decree was declared void, it had no right of action in the Wisconsin court. When the Supreme Court reversed the lower court, and declared that the decree was invalid in that State,

it destroyed the plaintiff's case. It rendered it impossible for the plaintiff to effectively amend its complaint. *It ended the litigation.* It may be that a better form of language for the judgment of the Supreme Court, would have been a direction to the Circuit Court to dismiss the plaintiff's action, and render judgment against it for costs; but it is submitted that to take further proceedings according to law, meant in this particular case just the same. The Supreme Court, by its decision, had rendered it impossible for the plaintiff to proceed, and had precluded amendment.

In *Danforth* v. *Danforth*, 111 Ill. 236, the appellant (defendant in the Circuit Court) moved in the Circuit Court for the setting aside of the decree of divorce, and for leave to defend. The Circuit Court denied the motion, and the defendant appealed to the Appellate Court, where the action of the lower court was affirmed, and the appeal was further prosecuted to the Supreme Court. That court reversed both the lower courts and remanded the cause generally, which meant for further proceedings according to law. The Supreme Court said, as to the effect of such reversal and remander, as follows: (246) * * * This court decided that the Circuit Court erred in refusing to set aside the decree of divorce, and upon that ground reversed the judgment of the Appellate Court, and remanded the cause. This is equivalent to remanding with directions to reverse the order of the Circuit Court, overruling the motion to vacate the decree, and to remand the case to the Circuit Court, with directions to the Circuit Court to allow the motion and vacate the decree."

In *Polleys* v. *Black River Co.*, 113 U. S. 81, there was a reversal by the Supreme Court of Wisconsin, and an order remanding the case to the Circuit Court, with directions "to enter judgment in accordance with the opinion of this [that] court." The finality of the judgment does not seem to have been questioned, and yet in substance and effect, it was only to take further proceedings according to law.

This plaintiff was powerless to direct the Supreme Court of Wisconsin as to the form of its judgment. If, then, the Supreme Court could reverse the lower court and enter a

judgment for "further proceedings," after having destroyed the plaintiff's right of action by an actually *final* decision upon *the* decisive question, and still preserve the right of the defendant to contend that no *final* judgment had been rendered by that court, and thus, that no writ of error could lawfully issue for the review of its decision, it has, indeed, discovered a method of nullifying Section 1, of Article IV, of the United States Constitution.

We do not understand that the obligation of "full faith and credit," can thus be avoided. The decision of the Supreme Court was *res adjudicata*, and was decisive of the *whole* case of the plaintiff. If the plaintiff had gone back to the Circuit Court, and, having omitted to amend (as it could not), that court had dismissed the complaint and rendered judgment against it for costs, and it had appealed from such judgment to the Supreme Court, the appeal would only have again brought up for consideration and decision the same question before decided, namely, as to whether the decree of assessment created a cause of action; and the Supreme Court would have been bound, not to reconsider the proposition as a new one before the court, but to reiterate and follow its former decision, on the ground that it was *res adjudicata*, and had not been open subsequent to such former announcement; and this would have obliterated the Federal question, and would have thus prevented forever, any reviewal by this court, of this decision of the Wisconsin Supreme Court, *already admitted by itself to have been erroneous.*

The case of *Northern Pacific Railroad Company* v. *Ellis*, 144 U. S. 458, is precisely in point. In that case an appeal was taken to the Supreme Court of Wisconsin by the defendant from a judgment of the Circuit Court, overruling its demurrer to the complaint. The Supreme Court affirmed the order of the lower courts, adjudicating a decisive point and remanding the cause for further proceedings.

The lower court, in pursuance of this opinion and decision of the Supreme Court, subsequently rendered judgment against the defendant, from which a *second* appeal was taken, and which involved the same question presented on the former appeal.

The Supreme Court of Wisconsin affirmed the lower court, and said (462): "It is sufficient to say that by repeated decisions, it has become the settled law in this State that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved, and is *res adjudicata* in that case," and further said: "But the decision of this court upon a demurrer upon the questions properly involved, can not be reviewed by the Circuit Court, nor, indeed by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and as between the parties to that litigation, for all time. This view of the law decides this case." That decision being brought here for review, the writ was dismissed, and this court said (464):

"The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, * * * The Supreme Court held that by reason of its decision of May 20, 1890, when the case was presented to the court on the appeal of the railroad company from the order of the lower court upon demurrer, the rights of the parties were *res adjudicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin; * * * and in this court. * * * Under these circumstances the judgment of the Supreme Court is not subject to review here."

In the present case, when the judgment of the Supreme Court was thus rendered, finally deciding adversely as to the decisive question concerning the plaintiff's right of action, the only course open was a direct appeal therefrom to this court for review. Any other course would have destroyed the right of review by this court, as settled by this decision in *Northern Pacific Railroad Co.* v. *Ellis*, from which we have quoted.

In determining the plaintiff's rights under the present writ, therefore, it is submitted, the sole question is, not what is the meaning of the words used in the reversal judgment, under

some circumstances, but what was the real purport and effect of the judgment and decision of the court, as determined by its opinion. Judged by that opinion, the judgment and decision was final, and ended the plaintiff's case, especially as tested by the law and practice of the courts of Wisconsin, and the decisions of this court.

Therefore the writ of error was properly issued for its review.

The judgment of dismissal and for costs rendered by the Circuit Court of Milwaukee County, was in pursuance of such judgment of the Supreme Court, and was, in effect, the judgment of the Supreme Court; though being entered by the Circuit Court, as the only *final* judgment in the case. The writ of error was consequently properly directed to the Circuit Court where the record was found, and it was properly allowed by the chief justice of the Supreme Court.

Polleys v. *Black River Co.*, 113 U. S. 81.
Atherton v. *Fowler*, 91 U. S. 143, 145 *et seq.*

Some decisions of the U. S. Supreme Court as to what constitutes a final judgment.

As to the nature of a final judgment, this court said in *St. Clair County* v. *Livingston*, 18 Wall. 628 (1873): "The judgment of the Supreme Court of the State can not be regarded as a final judgment in the sense in which the term is used in the judiciary acts. No judgment is final which does not *terminate* the litigation between the parties to the suit. This issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered, which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case."

In *Houston* v. *Moore*, 3 Wheat. 433, the court said: "This is not a final judgment of the Supreme Court of Pennsylvania. The cause may yet be finally determined in favor of the plaintiff in the State court."

In *Parcels* v. *Johnson*, 29 Wall. 653 (1874), the court said:

"Thus it is apparent that the parties have not yet exhausted the power of the State courts in the premises, and until that is done our power can not be called into action. This court must be the last resort of litigants in State courts."

In *Macomb* v. *Com'rs Knox County*, 91 U. S. 1 (1875), it was held that the reversal by the State courts for further proceedings according to law, was not final upon the *argument*, as applied to that case, that further proceedings might readily have been prosecuted in the trial court upon reversal.

In *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 (1882), this court, though dismissing the writ, held that a judgment is final when it actually terminates the contest on the merits. In that case the court said:

* * * "it *must terminate* the litigation between the parties on the merits of the case." * * * "It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, can not be brought here on writ of error (citing cases). This clearly is a judgment of that kind.

The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent the litigation between the parties has been terminated, so far as the State courts are concerned; but it still remains to decide whether the directors have in fact been guilty of the negligence complained of, and if so, what damages the stockholders have sustained in consequence of their neglect. The court of appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review, terminates the litigation in the suit."

THE OPINION OF THE WISCONSIN SUPREME COURT, AND THE FEDERAL QUESTION.

The judgment of the Circuit Court of Milwaukee County, being in favor of the plaintiff, was not the subject for exception by it; but in the Supreme Court of Wisconsin, the plaintiff vigorously endeavored to sustain that judgment, and urged the conclusive character of the decree of assessment of the Illinois court, in the action against the defendant in the Wisconsin court, not only because he was a stockholder and privy to it, but because it was a decree of a competent court of a sister state, and demanded full faith and credit under the constitution and laws of the United States.

This is evidenced by the opinion itself. [Rec. 91.] The court there says: "A court by its decree can not make that which is essentially wrong and unjust, right and just; but, it is said, we must *give full faith and credit* to the proceedings of the Illinois court, and that we should not presume it would make an unfair and unequal assessment."

The action of the Supreme Court in rendering its final judgment, and that of the Circuit Court, in rendering its judgment in pursuance thereof, gave the first occasion for objection, and the plaintiff in error, has, therefore, fully specified the errors of those courts, by its assignment in this court, found on pages 102–9, being the last three pages of the volume.

The case is thus prepared, as we believe, for the consideration and decision of this court.

In substance the opinion is as follows: It finds the pendency of the chancery suit in the Illinois court, and that the court there had jurisdiction of the corporation, and of its property and affairs by the appointment of the receiver, and was invested with full power to administer the estate of the plaintiff, manage its business, collect its assets and pay its debts; and it takes cognizance, as true, of all the averments of the complaint, including the substance of the decree of the chancery court. It admits (93) that the Illinois court "could decree or make a call on the unpaid subscriptions to the stock," yet asserts that such power was no greater than that which the

board of directors could have exercised in case the court had not taken jurisdiction of the plaintiff and its affairs. But the court held that because it appeared by the complaint and the decree, that there had been, previous to the making of the decree, unequal payments upon their stock by the various stockholders of the plaintiff, that therefore this decree which makes a uniform assessment of thirty-five per cent of the par value, upon all of the shares, held by the stockholders, was void, and impossible to be enforced against the defendant in this action in the courts of Wisconsin, and then proceeds to sustain its decision with an argument, or method of reasoning to the effect that the decree "is grossly unequal and unjust," and "should not be enforced." Notwithstanding the call by this decree is upon all stockholders alike, the court assumes the contrary, and quotes from Cook on Stock and stockholders, the following, that, "Calls must be made on all alike or they will be void. As stated, it concedes the jurisdiction of the court, and refuses to pass upon the contention against the plaintiff, that the assessment is excessive, saying: "We shall not go into that question at this time. Presumably the court examined into the financial condition of the corporation and determined what amount of money it was necessary to raise to meet its liabilities," and proceeded: "but *neither the court* nor the directors, were authorized to make an assessment so unequal and partial, as the complainant shows was made in this case." It further says: "It is certainly no 'forced inference' from the complaint that the assessment alleged to have been made is *illegal* and does not furnish a proper basis for this action, nor can the fact that the call or assessment was made by the court in the suit before it change our conclusions as to its *inequality* and unfairness. A court by its decree can not make that which is essentially wrong and unjust, right and just." The court further says:

"We do not intend to express any definitive opinion as to the real effect of the decree of the Illinois court, or as to how far it concludes the rights of shareholders who were not parties to that proceeding. Those questions are not now necessarily before us, and may be postponed until they arise.

We confine our decision to the objection that the complaint shows an unlawful and illegal call or assessment upon Mr. Burnham which should not be enforced."

It needs no extended argument to show that by this opinion and decision by the Wisconsin court, it denied to the unreversed and unmodified decree of the Illinois court, the full faith and credit to which it was entitled by the constitution and the laws of the United States; and that this was done while admitting the competent jurisdiction of the court in the chancery suit and over the plaintiff corporation, which was a party thereto. It refuses to pass, in terms, as to the binding force of the decree upon the defendant or other stockholders of the plaintiff, not personally present before the Illinois court, by reason of the relation, while denying its conclusive and binding force upon the defendant stockholder in the present action; thus unlawfully according to him the exemption from being affected by it, to which only persons not stockholders or parties were alone entitled.

The Wisconsin Supreme Court has recently overruled its decision in the present case by its opinion and decision in Parker v. Stoughton Mill Co. (rendered October 22, 1895), 64 N. W. Rep. 751.

It is gratifying to state to this court, that since this Burnham case was decided by the Wisconsin Supreme Court, and its removal to this court for review, that court has withdrawn from the position there taken, and has decided the case of *Parker* v. *Stoughton Mill Co.*, 64 N. W. Rep. 751, by a contrary holding, and exactly in accord with our present contentions. The Parker case is precisely similar, in facts and principle involved, to the case at bar. The action in the Parker case was based upon a decree of an Illinois chancery court, against stockholders of an Illinois corporation, residing in various States, for unpaid balances, for the payment of corporate debts. The corporation alone was before the chancery court, at the time the decree was rendered.

The receiver plaintiff brought his action against the defendant, a stockholder residing in Wisconsin. The defend-

ant demurred to the complaint and was sustained by the lower court, on the authority of the *Burnham* case. The plaintiff appealed to the Supreme Court, where the defendant contended for affirmance on the same authority. But that court embraced the first opportunity thus afforded to withdraw from the untenable position taken in the Burnham case, the Circuit Court refusing to follow its former decision.

Said the Supreme Court of Wisconsin in the Parker case: "The property in question (that is, the defendant's note, and its liability to pay assessments) was in Illinois at the office of the company. They were choses in action, and their situs was at the *residence* of the company. * * *

But it is argued that the complaint shows that the assessment made was inequitable and unjust, and was in fact a horizontal assessment, and hence will not be enforced. Upon this contention the case of *Telegraph Company* v. *Burnham*, 79 Wis. 47; 47 N. W. 373, is relied upon. That was a case of an assessment, made by an Illinois court, having jurisdiction, upon the stockholders of a bankrupt telegraph company; and it affirmatively appeared upon the face of the complaint that some of the stockholders had paid forty per cent of their subscriptions and some only two per cent, and that the assessment sued on was a horizontal assessment of thirty-five per cent upon all. This was held to be conclusively unequal and unfair.

It *seems* to have been considered that the plaintiff had, by his own allegations, impeached and discredited the decree of the court; and it was held that the complaint was *demurrable, notwithstanding the fact* that the assessment was made by a court of competent jurisdiction. We shall not attempt to justify all that is said in that case. By the constitution of the United States (Article IV, Sec. 1,) the courts of this State are bound to give full faith and credit to the "public acts, records and judicial proceedings of every other State." If a judgment is *conclusive* in the State *where rendered*, it *is conclusive here*. The *decree* by which the assessment in question was made, *was undoubtedly conclusive on the members* or policyholders of the defunct company, unless attacked in a direct

proceeding, notwithstanding they were not present when it was rendered. *Hawkins* v. *Glenn*, 131 U. S. 319; *Insurance Co.* v. *Langley*, 62 Md. 211.

It has so been held by the Appellate Court of Illinois, in considering this very assessment. *Rand, McNally & Co.* v. *Mutual Fire Ins. Co.*, 58 Ill. App. 528. We can come to no other conclusion than that we are bound under the constitutional requirement of "full faith and credit" to hold that the decree making the assessment in question, being conclusive in Illinois, upon all members and policy holders, unless attacked by direct proceeding, is conclusive here, and not open to collateral attack. *Griggs* v. *Becker*, 87 Wis. 313. Whatever is said in *Telegraph Co.* v. *Burnham*, *supra*, inconsistent with this conclusion, we are unable to follow."

It seems very clear that the Supreme Court of Wisconsin in this opinion, did not regard what it had held in the Burnham case as to the plaintiff's complaint, to the effect that it impeached the decree by alleging what was there claimed to be an "*unequal and unfair*" assessment, as being in any way a defense or excuse for the decision; for such an averment in the plaintiff's pleading, was only the statement of a fact presumably well known to the Illinois chancery court, when it rendered the decree, and the decree when thus rendered by a competent court, could not thus be attacked for *mere error*, whether set out as a part of the complaint, or where the fact might be offered to defeat the decree on the trial of the action.

But by an examination of the record in the case here [Rec. page 12] it appears that the decree of the Illinois chancery court, which is set forth in the complaint was brought to the attention of the Wisconsin court, and made a part of the plaintiff's case, and it shows that this finding of previous unequal payments by the stockholders before the making of the decree, was actually found as a fact, and duly considered, and contained in the decree itself. But the court made a *pro rata* assessment, and appears not to have esteemed it a part of its duty to delay the payment of the creditors by a long accounting in a previous effort to settle the equities among the stock-

holders themselves. *And this was a question solely within the jurisdiction of the Illinois court.*

The Wisconsin court in the Parker case, confines itself to a statement of what *seemed* to have been the holding in the Burnham decision, without any intention of sanction, and then proceeds to say: "We shall not attempt to justify all that is said in that case." And further says: "*Whatever is said in Telegraph Co. v. Burnham, supra, inconsistent with this conclusion, we are unable to follow.*"

But the cases cited by that court in the Parker case show that its *present view* as to the *case at bar*, is precisely contrary to what it was at the time of its former decision. It *now* concedes the unimpeachable character of the decree of a competent court of a sister State, when attacked collaterally, and the obligation of "faith and credit" under the constitution and laws of the United States. It relies upon *Hawkins* v. *Glenn*, 131 U. S. 319, where this court held that the stockholder is bound by a decree "in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company;" and further, (332) that although the chancery "court may have erred in its conclusions, [but] its decree can not be attacked collaterally;" and that the laws and judicial decrees and decisions of the state of the domicile, are conclusive in the courts of sister States, in actions therein between the corporation and its stockholders there residing; and where this court also held that a decree of assessment is a *judicial* proceeding, and that such a call or order stands upon a higher plane than a mere call by a board of directors. It also cites *Fire Insurance Co.* v. *Langley*, 62 Md. 196, where the court takes the same position (212–14), and says touching a similar decree: "We are unable to regard it any other light than as an *adjudication* by a court of competent authority, determining conclusively not only the amount of losses and expenses upon which the assessment was founded, but what notes should be assessed, and the exact percentage to which each class of them should be subjected. That the policy holders, or members of the corporation, are bound by this adjudication, in suits like the present

we entertain no doubt. We can not distinguish it in principle from what we decided in the recent case of *Glenn, trustee*, v. *Williams*, 60 Md. 93."

It also cites *Griggs* v. *Becker*, 87 Wis. 313 (decided in 1894), where the court held that all that was required to entitle a judgment or decree of a court of a sister State to "full faith and credit" was that the court rendering it had jurisdiction of the subject-matter and person of the defendant; and that: "If it was erroneous, it should have been corrected in the Court of Appeals of that State, but it is not within the province of this court to correct any mere error in the rendition of such foreign judgment. In the absence of fraud, we are confined to the question of jurisdiction."

The character of the recent opinion of the Wisconsin Supreme Court in this Parker case is not uncertain. It is a complete withdrawal from the position taken in the case at bar; *and it is submitted that a reversal by this court upon the present writ of error, will not be disappointing to the Wisconsin court.*

Briefs of plaintiff's counsel in Great Western Telegraph Company v. *Purdy, No. 105 of this term, so far as applicable, are herein referred to and made a part of this brief.*

Copies of our briefs for the plaintiff, in the case of Great Western Telegraph Company v. Purdy, in this court, No. 105 of this term, are herein referred to so far as applicable. Copies of the same have been delivered to counsel for defendants in error, and duplicates, with their acceptance noted thereon by them, have been filed in this case; also other copies for use by this court.

THE OBLIGATION OF "FULL FAITH AND CREDIT," AND ITS DENIAL BY THE OPINION AND JUDGMENT OF THE WISCONSIN COURT.

It is believed that the Supreme Court of Wisconsin, in the *Parker-Stoughton Mill Co. case*, to which we have referred, has given substantial reasons for its decisions there, as well as in support of its condemnation of its former decision and judg-

ment in the case at bar; but we will take the present opportunity to supplement a few additional suggestions.

The decision in the case at bar denies the conclusive legal presumption, especially applicable to the defendant, who was *privy* to the chancery proceedings, that the decree of assessment of the Circuit Court of Cook County, Illinois, on which the right of action rested, was rendered upon full consideration of all the material matters proper to be considered for the purposes of such decree.

It is in conflict with the settled rule that no court, in any case, can attack, review, consider, or nullify a decree of another court, whether interlocutory or final, made in another case, wherein the court had jurisdiction of the subject-matter and the parties, whether that court is in the same or a foreign State.

And, as applied to the treatment of this Illinois decree—or "*judicial proceeding*"—the decision is in violation of the provisions of Article IV, Section 1, of the Constitution. The opinion of the court admits and presumes that the Illinois court had full power to administer the estate of the plaintiff; in fact, admits that it had the full power to make *a* decree of assessment, and yet nullifies it by a denial of faith and credit, in the collateral law action, on behalf of the stockholder defendant, who was an *integral* part of the plaintiff corporation, and before the chancery court, for all the purposes of the assessment, when the decree was entered.

No party to an action in any court, foreign or domestic, can lawfully be sustained as to any proofs or contentions which nullify a decree introduced in evidence against him, and which decree was rendered in a former proceeding to which he was either party or privy. The rejection by the Wisconsin court of the decree, is based entirely upon its "*unjustness*," while admitting the power and duty of the Illinois court to make an assessment. Its objections were only such as could properly be raised before the chancery court, and to be considered by *that* court as a part of its duty in determining the character and terms of the decree to be entered, and the decree having been made, no party or court in any collateral action, including

this action, was authorized or entitled to question it further. It became and was *res adjudicata*, as to the defendant, in *all* its parts, both in the court where entered and in this action.

The objection of the opinion, rests upon the fact that the decree *recites* that some of the stockholders have paid only 50 cents a share, while others have paid $10 a share; and it is therefore impliedly held, that those who had paid only the smaller sum ought to have been decreed to pay the full amount of $10 per share, before the others were required to pay anything more. This is upon the assumption that those who had paid only 50 cents per share were *solvent*, and could have paid the $10 a share. This is a conclusion as to the facts which were *solely* within the knowledge of the Illinois court. That court in the decree finds that *many* of the stockholders were actually *insolvent*, and that *many* had removed from the jurisdiction of the courts of Illinois, and of the United States, and that, therefore, no assessment could be collected from them. Whether these insolvents, etc., included all those who had paid only 50 cents a share is problematical by the decree; but whatever the facts, if there was any error in this interlocutory decree it was the proper subject of review by the court which made it, *and by no other court.*

Stewart v. *Lay*, 45 Ia. 612.
Hamilton v. *Glenn*, 85 Va. 901.
Hamilton v. *Glenn*, 72 Md. 343 *et seq.*
Hamilton v. *Glenn*, 72 Md. 351 *et seq.*
Sanger v. *Upton*, 91 U. S. 58–9.

The doctrine of *res judicata*, therefore, makes this decree of assessment, as between the creditors and the company, and the stockholders, conclusive and final, until set aside in *that case*, where rendered, as to every objection that either was, or might have been, urged against its entry. The supreme question, and the one which the chancery court was bound to consider at the time the decree was entered, was, first, were the creditors, whose claims had been duly adjudicated, in the chancery case, entitled to an assessment; and, second, what should be the character of such assessment. The settlement of these questions, both as to the creditors, the corpora-

tion, and through it the stockholders there present, was essential to determine the character of the decree; and the decree embodies the rulings, the final adjudication of these questions by the chancery court.

This interlocutory decree could only be interfered with by the same court which rendered it, or by the higher court upon appeal. The *pros* and *cons* as to this decree, will be presumed to have been fully presented and considered by the court before the entry of the decree. The plaintiff's counsel are not called upon to defend its propriety or justness, before every other court in christendom. The only point to which any court of a sister State, is entitled to direct its attention, when the character of that decree is presented in the declaration or in the evidence, is, as to whether the chancery court had the authority to make ANY assessment; and when it has settled that question in favor of the court's authority to assess, it then becomes a matter of no concern to it, what the character of that decree was. It can not be declared *void*, because of its terms, if the court had *jurisdiction* to make *an* assessment.

The following are some announcements by this and other courts:

The principle of *res adjudicata* extends to any "matter properly involved, and which might have been raised and determined in it."

Bailey et al. v. *Bailey et al.*, 115 Ill. 557.

"It sweeps away every defense that could have been raised against it; and this, too, for the purposes of every subsequent suit, whether founded on the same, or a different cause."

Litch v. *Clinch et al.*, 136 Ill. 425.

"The jurisdiction of the court and of the receiver being conceded, and the fact of assessment being admitted, it is to be regarded as *res adjudicata*. All questions as to the indebtedness of the bank, and the like, involved in the assessment, or which it was necessary to determine before making it, *must be* presumed to have been adjudicated, and the defendant is bound thereby. Any errors made by the court in the proceedings appointing the receiver, and controlling and directing his action, must be corrected by proper application to

that court, or by appeal from its orders, or decisions, as provided by the law applicable to such cases. * * * *None* of these matters can be set up in an action brought by him under the direction of the court."

Stewart v. *Lay*, 45 Iowa 612.

"The court has power over the subject-matter, and the parties. * * * In making the order of sale, the court is presumed to have adjudged every question necessary to justify such order or decree. * * * The court having a right to decide every question which occurs in a cause, whether its decision be correct or otherwise, *its* judgment, until reversed, is binding on every other court. * * * The court is not bound to enter on record the evidence on which any fact is decided."

Florentine v. *Barton*, 2 Wall. 210.

"If the law confers the power to render a judgment or decree, then the court has jurisdiction; *what* shall be decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. Jurisdiction being obtained over the person and the subject-matter, no error in its exercise can make the judgment void. The authority to decide being shown, it can not be divested, by being improperly or incorrectly employed."

Freeman on Judgments (2d Ed.), Sect. 135.

"There is no principle of law better settled than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of their proceeding from the initiation to their completion, as to their adjudication, that the plaintiff has a right of action. Every matter adjudicated, becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged. * * * So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power."

Voorhees v. *United States Bank*, 10 Peters 471.

"The question of the conformity of these proceedings to the requirements of the statutes under which they were had,

has been very fully discussed by counsel, and if we *were sitting here as on a writ of error* to the judgment of the State court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the citation of authorities from the Tennessee courts. *But we occupy no such position.*

"The record of this case is introduced collaterally as evidence of title in another suit between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be Nor can it disregard that judgment or refuse to give it effect on any other ground than a want of jurisdiction in the court which rendered it.

"It is of no *avail*, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court and by all courts, *and it takes rank as an axiom* of the law."

Cooper v. *Reynolds*, 10 Wall. 308, 315–16.

See, also, to same effect: *Commercial National Bank* v. *Burch*, 141 Ill. 519; *Benefield* v. *Albert*, 132 Ill. 672; *Wenner* v. *Thornton et al.*, 98 Ill. 168; *Barnett* v. *Wolf*, 70 Ill. 80–1–2; *Harris* v. *Lester et al.*, 80 Ill. 314–15; *Bowen* v. *Bond et al.*, 80 Ill. 355; *Hobson et al.* v. *Ewan*, 62 Ill. 154; *Hernandes* v. *Drake*, 81 Ill. 38; *Schott* v. *Youree*, 142 Ill. 233; 1 Greenleaf on Ev., Sec. 19.

See also:

Cutter v. *Huston*, 158 U. S. 423, 430.
McCormick v. *Sullivant*, 10 Wheat. 192, 199.
Evers v. *Watson*, 156 U. S. 527, 533.
Ambler v. *Whipple*, 139 Ill. 322, 323–5.
Rouse v. *Letcher*, 156 U. S. 47 to 50.

The Supreme Court of Wisconsin itself, on a former occasion has refused to allow a collateral attack in one court upon the judgments and decrees of another; and especially as here, where the party attacking, could have intervened in the original proceeding and made his motion. In *Coon* v. *Seymour*, 71 Wis. 346, that court said:

"The plaintiff could have made his motion in the municipal court, which was a court of record;" and further said: "This of itself was sufficient to require the refusal of equitable interference by any other court. * * * As observed the subject-matter of this action is to open and set aside the judgment of the municipal court. The Circuit Court of *Eau* Claire County had no jurisdiction over such subject-matter."

The contract of subscription made by the defendant, constituted him an integral part of the Illinois corporation; and his residence, for all corporate purpose, became thereby in the State of the domicile, and the rights and benefits given by its laws became a part of such contract; and the laws or judicial decisions of other States are not in any way controlling, and can not be interposed as defenses in their courts; and *therefore, the scope and effect of the Illinois decree, before the commencement of this action, having been determined by the Supreme Court of Illinois, its decision should have been concurred in by the Wisconsin court, for the defendant was an admitted stockholder, and thus privy to it.*

Great Western Telegraph Company v. *Gray*, 122 Ill. 630.

Bates et al. v. *Great Western Telegraph Company et al.*, 134 Ill. 536.

Hume v. *Bank*, 128 U. S. 383.

Hawkins v. *Glen*, 131 U. S. 331–2.

Glenn v. *Liggett*, 135 U. S. 54.

Mann v. *Cooke*, 20 Conn. 189–190.

Patterson et al. v. *Lynde et al.*, 112 Ill. 196.

Spelling on Corporations, § 913.

Young v. *Farwell*, 28 N. E. (Ill.) 845.

New Haven Horse Nail Co. v. *Linden Spring Co.*, 142 Mass. 34, 37.

2 Beach on Priv. Corp., pp. 219–20.

Hamilton v. *Glenn*, 72 Md. 342–3.

This Wisconsin court is in error when it holds in *this* case that it has the same right to question in this proceeding the decree of assessment, that it would have had to question the

validity of a call by the board of directors of the plaintiff, if it was not under the jurisdiction of the court.

The chancery decree of the Illinois court has the full dignity, force and effect of a *judicial* proceeding, which it is, and it is entitled to the full "*faith and credit*" which should, under like circumstances, be awarded to any other decree of a court of competent jurisdiction of that State. This is now admitted by the Wisconsin court in its recent decision in *Parker* v. *Stoughton Mill Co.*, *supra*.

See, also,

Great Western Telegraph Co. v. *Gray*, 122 Ill. 630.
Lewis, Adm'r, v. *Glenn*, 84 Va. 974–7 (in which the Virginia court refers to, and approves, the decision of the Illinois Supreme Court in the *Gray* case).
Sanyer v. *Upton*, 91 U. S. 58–9.
Glenn v. *Williams*, 60 Md. 93, 121.
Fire Insurance Co. v. *Langley*, 62 Md. 196 (cited by the Supreme Court of Wisconsin in *Parker* v. *Stoughton Mill Co.*, decision Oct. 22, 1895).
Patterson v. *Lynde*, 106 U. S. 521.
Scovill v. *Thayer*, 105 U. S. 143.
Hamilton v. *Glenn*, 72 Md. 342–3.
Hatch v. *Dana*, 101 U. S. 215.
Lamb, Assignee, v. *Lamb*, 6 Bissell 424.
Vanderwerken v. *Glenn*, 85 Va. 9,

and cases heretofore cited.

The decree of assessment of the Illinois court, was an adjudication of every fact necessary to support and validate it, as creating a liability and right of action, fully binding upon the corporation and all of the stockholders, including the defendant, who were before the court personally and by adequate representation, and *so conclusively* that it could not in any collateral action, brought to enforce the same, be *nullified* by any defenses interposed therein by such stockholders, whether touching the *terms* of the decree or alleged previous *laches* on the part of the plaintiff through its officers, who were the *agents* of the stockholders, or otherwise. Being

conclusive upon the stockholder defendant in the *chancery suit* it will be so in *every other proceeding* against stockholders and subject there to *no* nullification, partial or complete.

See cases already cited, also

Glenn v. *Spring*, 26 Fed. Rep. 494–5.
Upton v. *Tribilcock*, 91 U. S. 45, 55.
Lehman, Durr & Co. v. *Glenn*, 87 Ala. 627.

In this action, the Wisconsin court was bound to extend to the decree, therefore, the "full faith and credit" to which it was entitled where rendered, but which it unlawfully denied to it.

See cases cited, and especially

Hawkins v. *Glenn*, 131 U. S. 319.
Glenn v. *Williams*, 60 Md. 121.
Hamilton v. *Glenn*, 72 Md. 342–3.
Lewis, Admr., v. *Glenn*, 84 Va. 988.
Lehman, Durr & Co. v. *Glenn*, 87 Ala. 626.
Kennedy v. *Gibson et al.*, 8 Wall. 505.

In the action at *bar*, the Supreme Court of Wisconsin overruled one of its former decisions; for in *Brown* v. *Parker*, 28 Wis. 24, the court forcibly stated the correct rule:

"In determining the effect of the judgment sued upon, how far it may be re-examined, and what relief, if any, may be granted against it, we are to act and decide precisely as the court of *Illinois* would do were the same questions there presented. Judge Story, in his examination of the subject as to the effect of the records and judicial proceedings of one State in the courts of another, under the clause of the constitution of the United States, the acts of congress, and the decisions of the Supreme Court, concludes by stating the rule as follows:

"It gives them the same faith and credit as they have in the *State court* from which they are taken. If in *such court* they have the faith and credit of the highest nature, that is to say of *record evidence*, they must have the same faith and credit in every other court. So that congress have declared the effect of the records by declaring what degree of faith and credit shall be given to them. If the judgment is *conclusive* in the *State* where it is *pronounced*, it is equally conclusive

everywhere. If re-examinable there, it is open to the same inquiries in every other State. It is, therefore, put upon the same footing as a domestic judgment. 2 Story on the Constitution, § 1313."

See, also, *Kellam* v. *Toms*, 38 Wis. 595.

The decision of the Supreme Court, in the *Gray* case [122 Ill. 630], and the *Bates* case [134 Ill. 536], has settled the question as to whether this decree can be re-examined and repudiated in a collateral law action. The other Illinois cases cited, show how conclusive are the decrees and judgments generally of her courts of record. See, also,

Stark v. *Ratcliffe*, 111 Ill. 80–1
McMillan v. *Lovejoy*, 115 Ill. 501.
Rendleman v. *Rendleman*, 118 Ill. 265–6.
Roe v. *Hulbert*, 17 Ill. 572.
Cole v. *Favorite*, 69 Ill. 460-1.
Bimeler v. *Dawson et al.*, 4 Scam. 540.

It is confidently submitted by the foregoing, including what we have presented in our briefs, *original* and *reply*, in the *Purdy* case, No. 105, of this term, that we have sufficiently pointed out the error of the Wisconsin courts, and that their judgments should be reversed, with such other and further orders in the premises as may appear to the court proper.

Respectfully submitted,

THOMAS J. SUTHERLAND.
Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Of Counsel.

Office Supreme Court U. S.
FILED.
MAR 21 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

GREAT WESTERN TELEGRAPH CO.
vs.
BURNHAM *et al.*
No. 159.

ADDITIONAL AUTHORITIES SUBMITTED BY MR THOMAS J. SUTHERLAND, COUNSEL FOR PLAINTIFF IN ERROR, UPON HIS ORAL ARGUMENT, MARCH 19th and 20th, 1896, IN SUPPORT OF POSITIONS TAKEN THEREIN.

I.

As showing efforts of stockholders, by independent equity proceedings to set aside the decree of assessment of the Illinois Chancery Court. Bates *et al. v.* Great Western Tel. Co. *et al.* 35 Ill. App., 255; Bates *et al. v.* Great Western Tel. Co. *et al.* 134 Ill., 536; Farwell *et al. v.* Great Western Tel. Co. *et al.* 47 Ill. App., 579.

II.

To the effect that these decisions are *res adjudicata*, as to any further questioning of that decree, and a bar both to all direct or collateral attacks upon it either by the corporation or its stockholders. 2 Van Fleet's Former Adjudication, 998; Willoughby *v.* Chicago Junction Ry., 50 N. J. Eq., 556; Harmon *v.* Auditor, 123 Ill., 122; Hamilton *v.* Glenn, 72 Ill., 356–7; McCormick *v.* Sullivant, 10 Wheat., 199, 200; Voorhees *v.* Bank, 10 Pet., 473.

III.

To the effect the question of the validity and effect of the decree of assessment, is determined, and a proper discussion of the matter closed, both as touching the *jurisdiction* of the court which made it, and the equity of the decree; because these questions have been determined by the court which made it, and by the highest court of the State, in which the corporation had its domicil, and under whose laws the plaintiff was duly incorporated. Hamilton *v.* Glenn, 72 Md., 350; Hawkins *v.* Glenn, 131 U. S., 331–2; Lewis, Admr., *v.* Glenn (and cases cited), 84 Va., 988; Lehman, Durr & Co. *v.* Glenn, 87 Ala., 626, 7; Kennedy *v.* Gibson *et al.* 8 Wall., 505; Voorhees *v.* U. S. Bank, 10 Pet., 471; Hollins *v.* Brierfield Coal and Iron Co., 152 U. S., 371, 380; Dowell *v.* Applegate, 152 U. S., 327; Glenn *v.* Spring, 26 Fed. Repr., 494–5; Patterson *v.* Lynde, 112 Ill., 196, 206–8; 2 Black on Corp., §546, 569, p. 219, 20; Glenn *v.* Liggett, 135 U. S., 533; 2 Beach on Pr. Corp., pp. 219–20, §569; Spelling on Corporations, §313; Young *v.* Farwell, 28 N. E. (Ill.), 845; Sampson *v.* Fowler, 44 Ill., App. 186; Schertz *v.* Bank of C., 47 Ill. App., 124; New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass., 34, 37; Christmas *v.* Russell, 5 Wall., 302.

And to effect that such decree was entitled to be enforced in Wisconsin. Caldwell *v.* Carrington's heirs, 9 Pet., 86; Glenn *v.* Williams, 60 Md., 112, 113; Brown *v.* Parker, 28 Wis., 24; Mills *v.* Duryee, 7 Cranch, 481; Christmas *v.* Russell, 5 Wall., 290; Green *v.* Van Buskirk, 7 Wall., 139; Warner *v.* Joffray, 96 N. Y., 248; Ambler *v.* Whipple, 139 Ill., 332–3; Stark *v.* Radcliffe, 111 Ill., 80–1; Killain *v.* Toms, 38 Wis., 595; McMillan *v.* Lovejoy, 115 Ill., 501; Rendleman *v.* Rendleman, 118 Ill., 265–6.

IV.

To the effect that the *decree* of assessment of the Illinois Chancery Court is in every respect *judicial*, and not questionable even on the ground that it is in respect of the enforcement of a corporate duty on the part of the stockholders. Kennedy *v.* Gibson, 8 Wall., 505; Sanger *v.* Upton, 91 U. S., 56, 58; Glenn *v.* Williams, 60 Md., 121; Vanderwerken *v.* Glenn, 85 Va., 11; Hamilton *v.* Glenn, 72 Md., 342–3; Lewis, admr., *v.* Glenn, 84 Va., 988; Lehman, Durr & Co. *v.* Glenn, 87 Ala., 626; Semple *v.* Glenn, 91 Ala., 245; Hawkins *v.* Glenn, 131 U. S., 329–332; Glenn *v.* Liggett, 131 U. S., 548; Glenn *v.* Spring, 26 Fed. Repr., 494–5; Fire Ins. Co. *v.* Langley, 62 Md., 196.

V.

To the effect that the decision of the Supreme Court of Illinois is permanent as to the validity of the decree, and as to the complete jurisdiction of the court which made it, and beyond *recall*, *even* by the Illinois Supreme Court. Walker *v.* Doane, 108 Ill., 246; Marshall *v.* Silliman, 61 Ill., 221; Hopkins *v.* McCann, 19 Ill., 115; Cooke *v.* Norton *et al.* 61 Ill., 286–7; McCormick *et al. v.* Bauer, 122 Ill., 579; Harmon *v.* Auditor, 123 Ill., 122; Union National Bank *v.* Int. Bank, 123 Ill., 517; Speight *v.* People, 87 Ill., 596–9; Hamilton *v.* Glenn, 72 Md., 351; Northern Pacific Ry. *v.* Ellis, 144 U. S., 464–465.

VI.

To the effect that the stockholder has no standing in court, in a collateral *law action* brought to enforce the decree, nor by an *independent equity proceeding*, to question the validity of the decree of assessment. Bates *et al. v.* G. W. Tel. Co., 35 Ill. App., 255; Bates *et al. v.* G. W. Tel. Co., 134 Ill., 536, 550; Farwell *et al. v.* G. W. Tel-

Co., 47 Ill. App., 579; Sanger *v.* Upton, 91 U. S., 56, 59; Hamilton *v.* Glenn, 72 Md., 331–349, 50; Hamilton *v.* Glenn, 72 Md., 354; Stewart *v.* Lay, 45 Ia., 612; Graham *v.* Boston H. &. E. R. R., 118 U. S., 162, 177.

VII.

Also to effect that in *no* case will the proceedings of a pending suit be interfered with at the instance of parties or *privies* thereto, or in courts of *concurrent* jurisdiction, nor in any other than courts of appellate jurisdiction, by any proceedings whatever, and that consequently the decree of assessment is invulnerable to any attack outside of the pending case. Field *v.* Ridgeley, 116 Ill., 424; Shephard *v.* Speer, 41 Ill. App., 211; Shephard *v.* Speer, 140 Ill., 238; Hanchett *v.* Waterbury, 115 Ill., 220; Preston *v.* Spaulding, 120 Ill., 208; Wilson *v.* Aaron, 132 Ill., 238; Newman *v.* Coml. Bank, 156 Ill., 259; See cases hereinbefore noted under heads I and VI; Pond *v.* Harwood, 139 N. Y., 111, 118.

VIII.

To the effect that neither by force of any statute of a State, nor by any particular form of words in a final decision or judgment of the highest court in a State, nor by any alleged application of a statute of limitations of a State, can the obligations of *full faith* and *credit* be evaded by the courts of that State, and which is due to the decree of a court of a sister State, as of and from the date of its entry. Christmas *v.* Russell, 5 Wall., 290 *et seq.*

Respectfully submitted.

THOMAS J. SOUTHERLAND,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

TERM No. 159.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,

against

BARBARA BURNHAM, CHARLES T. BURNHAM AND JOHN Q. BURNHAM, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE BURNHAM, DECEASED,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

BRIEF FOR DEFENDANTS IN ERROR.

REESE E. FOUBERTH,
Counsel for Defendants in Error.

CHARLES QUARLES,
GEORGE LINES,
Of Counsel.

SEN. ENGEL, PRINTER, MILWAUKEE, WISCONSIN.

Co., 47 Ill. App., 579; Stanger *v.* Upton, 91 U. S., 56, 59; Hamilton *v.* Glenn, 72 Md., 331–340, 50; Hamilton *v.* Glenn, 72 Md., 354; Stewart *v.* Lay, 15 Ia., 612; Graham *v.* Boston H. & E. R. R., 118 U. S., 162, 177.

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Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the Circuit Court of Milwaukee County, Wisconsin, by plaintiff in error, against George Burnham in his life time, and after his death, was revived against the executors of his will who are the defendants in error here.

The action is upon a contract of subscription to the capital stock of the plaintiff corporation. It appears from the complaint, that Burnham in May, 1869, subscribed for and agreed to take 100 shares of the capital stock, and pay for the same as follows: Five per cent. of the par value down, and the balance of the par value, —to-wit: $25 upon each share so subscribed for—from time to time, as the directors of the corporation should order. Burnham has paid forty per cent., or $10 on each share subscribed for, leaving sixty per cent. or $15 on each share unpaid. The complaint alleges that a large number of other persons besides Burnham also subscribed for the capital stock, to the extent and amount of all the shares into which the capital stock was divided, upon agreements similar in all respects to Burnham's agreement. It is further stated in the complaint that, in November, 1869, a suit was commenced in the Circuit Court of Cook County, Ill., wherein one Terwilliger, a stockholder, was plaintiff, in behalf of himself and other stockholders similarly situated, against the plaintiff corporation and other defendants,

which suit is still pending and undetermined. The corporation appeared in that action, and submitted to the jurisdiction of the court. In the proceedings therein taken, the court, among other things, took control of the powers and property of the corporation, appointed a receiver, with the usual powers of a receiver, to take charge of the affairs of the corporation, manage its business, collect the assets, and pay the debts of the corporation. It is alleged that in July, 1886, the corporation was justly indebted to sundry persons in a large amount, namely, the sum of $400,000, the whole of which indebtedness accrued against the company after Burnham entered into his contract of subscription, and that the corporation has no property, except the amounts unpaid upon the shares of the capital stock, to pay or meet this indebtedness; that the unpaid shares are largely in excess of said indebtedness. And it is further alleged that, before said last named date, a small number of its stockholders had paid to the plaintiff $25 on each of its shares of stock subscribed for by them respectively, being the par value, and in full of the same; that none of the remainder of said stockholders and subscribers had before said last named date, nor have any of them now, paid more than $10 upon each of the shares of the capital stock severally subscribed for, or held by them; that many of them have never paid more than fifty cents upon each of such shares severally subscribed for by them, and there was on said last named date, a balance and amount unpaid upon each of the shares of the capital stock, (except those which have been paid for in full as aforesaid) including those subscribed for by the defendant Burnham, of not less than $15, which the stockholders are severally liable to pay, when called upon and ordered to pay, according to the terms of their several agreements of subscription.

The complaint further alleges that in said Terwilliger suit, the Circuit Court of Cook county, Illinois, on July 10th, 1886, rendered a decree in and by which, after finding and reciting the facts substantially as above set forth, it was ordered and decreed "That a call or assessment be made upon the stock and stockholders of the plaintiff, (except those who had paid in full) their legal representatives and assigns, of 35 per cent. of the par value of the shares of said stock subscribed for and held by them respectively, being $8.75 on each and every share thereof, and that its stockholders and every one of them, (except those who have paid $25 on every share subscribed for or held by them) and their legal representatives and assigns, pay to the receiver of the plaintiff the several amounts so called for, assessed and ordered to be paid, namely, $8.75 on each and every share subscribed for or held by them, respectively."

The complaint contains no averments to show the effect of this decree under the laws of Illinois; or that it had any different effect there from what it would have according to the principles of general law; or that its effect in that state is dependent upon anything peculiar to its local jurisprudence.

To this complaint the defendants demurred on the ground, among others, that said complaint does not state facts sufficient to constitute a cause of action (Rec., p. 8); that being one of the statutory grounds of demurrer in Wisconsin.

From an order of the Circuit Court of Milwaukee County, overruling the demurrer, the defendants appealed to the Supreme Court of Wisconsin, which latter court reversed said order and on December 16th, 1890, rendered the following judgment:

"This cause came on to be heard on appeal from the order of the circuit court of Milwaukee County, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the order of the circuit court of Milwaukee County overruling the demurrer to the complaint in this cause be and the same is hereby reversed, with costs against the said respondent, taxed at the sum of one hundred and twenty-three and $\frac{25}{100}$ (123.25) dollars, and that this cause be and the same is hereby remanded to the said circuit court for such further proceedings therein as may be according to law."

Thereafter the plaintiff having declined to amend its complaint and elected to stand thereon, (Rec. p. 18-19) the circuit court of Milwaukee County ordered judgment against it dismissing the complaint (Rec. pp. 20-21); and such judgment was entered April 2, 1892 (Rec. pp. 21-22).

To review that judgment this writ of error has been sued out.

ARGUMENT.

I.

This court has no jurisdiction to review the judgment of the Circuit Court of Milwaukee County for the following reasons: First. Because said court is not the highest court of the State of Wisconsin in which a decision of the suit could be had; Second. Because no federal question is presented by the record.

First. The judgment complained of, and sought to be reviewed by the writ of error in this case, is that of the Circuit Court of Milwaukee County, State of Wisconsin, entered upon refusal of plaintiff in error, who was plaintiff below, to amend its complaint. (Record pp. 21-22.) This complaint had been demurred to by the defendants, the demurrer overruled by the Circuit Court and an appeal taken by the defendants to the Supreme Court of the State of Wisconsin, which court reversed the order overruling the demurrer and remanded the case to the Circuit Court of Milwaukee County for further proceedings. (Record p. 15).

This was not a final judgment,

Smith vs. Adams, 130 U. S., 167.,

Nor did it order judgment as in

Polley vs. Black River Co., 113 U. S., 81.

Thereupon plaintiff, being ruled to show cause why the complaint should not be dismissed, refused to amend its complaint, (Record, pp. 18-19), and judgment was rendered for defendants by the circuit court. From this judgment no appeal was taken to the Supreme Court of the State, although such appeal was authorized by Secs. 3047 and 3048 of the Revised Statutes of said state, which read as follows:

"Section 3047. Appeals to the supreme court may be taken from the circuit courts and also from county courts having civil jurisdiction, except in cases where express provision is or may be made by law for an appeal to the circuit court from county courts, and from any court of record having civil jurisdiction, when no other court of appeal is provided by law."

"Section 3048. No writ of error shall be necessary to bring up any judgment for review before the supreme court, but any judgment or any order defined in section three thousand and sixty-nine may be reviewed upon an appeal by any party aggrieved. The party appealing is called the appellant, the other, the respondent."

There is, therefore, no judgment of the highest court of the State to which the case might have been taken, and this court has no jurisdiction on the writ of error.

Rev. Stat. U. S., Sec. 709.
McComb vs. Com'rs, 91 U. S., 1.
Davis vs. Crouch, 94 U. S., 514.
Fisher vs. Perkins, 122 U. S., 522.

Second. The petition for the writ and the assignment of errors herein, specify but one error in the judgment of the Circuit Court of Milwaukee county, which can be claimed to warrant the exercise of the jurisdiction of this court, under Sec. 709, U. S. R. S., viz: That in and by its judgment, the said Circuit Court of Milwaukee county failed to give to the order or decree of the Circuit Court of Cook county, Illinois, set forth in the complaint, that full faith and credit to which it was entitled under the U. S. Constitution, Sec. 1, Art. IV.

It is submitted that the question whether full faith and credit was given to the Cook county decree as required by this constitutional provision, is not presented by the record.

The complaint states the substance of that decree but does not allege what effect it was entitled to under the laws of Illinois, or that under the jurisprudence of that State, it was entitled to any peculiar force, or different effect than it would have by general principles of law applicable elsewhere.

The courts of Wisconsin do not take judicial notice of the laws of the other states of the Union, but those laws must be pleaded and proved as facts.

Bank vs. McGeoch, 73 Wis., 332.
Osborn vs. Blackburn, 78 Wis., 209.
Rape vs. Heaton, 9 Wis., 329.
Griggs vs. Becker, 87 Wis., 313.

Therefore upon writ of error to a Wisconsin court, this court will not take judicial notice of the law of another state, not pleaded or proved in that court, and made part of the record sent up.

Hanley vs. Donoghue, 116 U. S., 1.
Renand vs. Abbott, ibid, 277.
C. & A. Railroad vs. Wiggins Ferry Co., 119 U. S., 615.
Lloyd vs. Matthews, 155 U. S., 222.

Nor will this court take jurisdiction by writ of error to review the judgment of a State court on the ground that "full faith and credit" has not been given to the judgment of a court of a sister state, unless the record shows that the "faith and credit" to which such judgment was entitled in the state where rendered, was brought to the knowledge of the court rendering the judgment sought to be reviewed by proper pleadings or proofs.

Hanley vs. Donoghue, *supra*.
C. & A. Railroad vs. Wiggins Ferry Co., *supra*.

The Wisconsin court, not being apprised, by the pleadings of the peculiar effect, if any, of the Illinois decree under the jurisprudence of Illinois, did not have that question before it and hence did not decide it.

On the contrary, the Supreme Court of Wisconsin declined to pass upon that question, holding that it was not before the court.

79 Wis., 52.

But, on the pleadings, the Wisconsin court could, and was bound to, decide what effect should be given the Illinois decree upon general principles of law applicable to such decrees, irrespective of any doctrine peculiar to the laws of Illinois. And its decision based upon and embodying its views of such general principles of law is not reviewable by this court.

Railroad Co. vs. Ferry Co., *supra*.
Lloyd vs. Matthews, *supra*.

II.

The defendants in error are not concluded by the decree of the Illinois Court ordering the assessment.

Defendants testator was not a party to the suit in the Circuit Court of Cook county. The corporation alone was before the Illinois court. The stockholder was there only in so far as he was a constituent of the corporation and the court could act upon him only in so far as its action operated upon the corporation. Otherwise the stockholder has no day in court.

The court acts judicially in taking an account of the assets and liabilities of the corporation, thereby ascertaining the amount necessary to be raised and in determining that an assessment is nesessary to produce such sum, and to that extent its decision is binding on all stockholders.

But when the court makes a call it simply discharges the duty of the directors and "the order of assessment has the same force as an assessment made by the company," and no more.

Lamb vs. Lamb, 6 Biss., 424.
Bangs vs. Duckinfield, 18 N. Y., 592–598.
G. W. Tel. Co. vs. Burnham, 79 Wis., 47–52.
Cuykendall vs. Corning, 88 N. Y., 129.

The doctrine that in making a call upon stockholders of an insolvent corporation for unpaid subscriptions to the capital stock, the court acts in the place and discharges the functions of the board of directors, has been fully affirmed in Illinois in two recent cases involving the decree here in question.

G. W. Tel. Co. vs. Loewenthal, 154 Ills. 261–7.
Bennett vs. G. W. Tel. Co., 53 Ill. App., 276.

In the case last cited, it is expressly held that as respects payment of his subscription, the relation between the stockholder and the corporation is one of contract and he is not bound by proceedings to which he is not a party.

III.

The assessment ordered by the Illinois Court was partial, unequal and void.

It appears from the order or decree of the Circuit Court of Cook county, recited in the complaint herein, that some of the stockholders had paid but two per cent upon their subscriptions, while others, including defendant's testator, had paid forty per cent. yet upon both classes the court directed a horizontal assessment of thirty-five per cent.

Such an assessment, if made by the directors, would clearly be void and not conclusive on the stockholders.

Morawetz Priv. Corp., (2d Ed.) Sec. 154.
Cook on Stock and Stockholders, (2d Ed.) Sec. 114.
Pike vs. B. & C. S. L. Ry. Co., 68 Me., 445.

And as the court in making an assessment acts in the place of the directors having the same power, and the same duties conferred and imposed upon them, it follows that the same rule of conclusiveness applies to calls made by either authority. In neither case could irregularities be complained of; but neither the directors nor their successors, the receiver or the court, *have any power* to subject the stockholders to anything but equality of assessment.

Hawkins vs. Glenn, 131 U. S., 333.
3 Thomp. Corp., Sec. 3539.
2 Thomp. Corp., Sec. 1721.
Bangs vs. Duckinfield, *supra.*
G. W. Tel. Co. vs. Burnham, 79 Wis., 47.

The Court of Appeals of Illinois has recently, in a collateral action, held this very assessment void on the ground of its inequality.

Bennett vs. G. W. Tel. Co., 53 Ill., App. 276.

The case last cited is not in conflict upon this question with *G. W. Tel. Co. vs. Gray, 122 Ill., 630*, or any of the other cases growing out of the plaintiff's insolvency, since the point was not in any way touched upon in the earlier cases. Indeed the point seems to have been overlooked in all this litigation until raised by defendants in error in the case at bar.

The decision in the Bennett case is but the natural and inevitable corrollary of the rule announced in

G. W. Tel. Co. vs. Lowenthal, 154 Ill., 268,

where the Supreme Court say: "The assessment could extend no farther than would an assessment made by the board of directors if no receiver had been appointed, and there had been no interference in the affairs of the company by the court."

It thus appears that the courts of Wisconsin gave to the Cook County decree, precisely the effect to which the Illinois courts have since decided it was entitled, and therefore, whether those decisions are right or wrong on general principles of law, the ground asserted for the jurisdiction of this court to review the judgment in the case at bar on this writ, wholly fails.

REESE H. VOORHEES,
Counsel for Defendants in Error.

CHARLES QUARLES,
GEORGE LINES,
Of Counsel.

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IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

THOMAS J. SUTHERLAND,
Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Of Counsel.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The judgment here sought to have reviewed is the judgment and decision of the Supreme Court of Wisconsin, and not of the Circuit Court of Milwaukee county. It is here contended that the judgment of the Supreme Court was, in substance, an order to the Circuit Court to dismiss the plaintiff's action, and enter a judgment against the plaintiff for costs. That, also, the judgment of the Supreme Court against the plaintiff for a large sum of money as *costs* in that court was also *final*, and subject to review in this court. The assignment

of errors, while it objects to the entering of judgment by the Circuit Court, equally assigns the proper errors to the action of the Supreme Court, thus making them quite sufficient from any point of view [Record pp. 102–9]. But the practice here followed is upon the theory that the judgment of the Supreme Court is the one brought up for review.

The Chief Justice of the Supreme Court allowed the writ, and the writ was directed to the Circuit Court, to which court, under the Wisconsin practice, the record had been transmitted by the Supreme Court and was *there* alone to be found.

Polleys v. *Black River Co.*, 113 U. S. 82.

THE CASES CITED BY DEFENDANTS' COUNSEL DO NOT SUPPORT THEIR CONTENTIONS.

In *Smith* v. *Adams*, 130 U. S. 167, the judgment of the Territorial Supreme Court of Dakota, was neither in substance nor form, a final judgment, and by no means came within the description of a final decision upon the *merits;* nor did it have, as its legitimate result, the ending of the litigation between the parties, as defined by this court to be the characteristic of a final judgment. The original plaintiff, Adams, was an elector, and filed his complaint as such, in the District Court against the commissioners of the county. The District Court sustained a demurrer to it. The Territorial Supreme Court reversed this judgment. It thus sanctioned the plaintiff's action, and he was both entitled and bound to proceed in the lower court. The Supreme Court, by its decision, not only did not decide adversely to his rights, but left his action as he had commenced it, with all obstacles to further proceedings brushed away.

In *Polleys* v. *Black River Co.*, *supra*, the judgment of the Supreme Court was an order to the Circuit Court "to enter judgment in accordance with the opinion of this (that) court," thus leaving the lower court to pursue its own course, in its discretion, upon its proper construction of such opinion. It did not direct the Circuit Court in terms to enter a *partic-*

ular judgment. It was, in substance, only to take further action "according to law," and act in accord with the Supreme Court decision.

In the case at bar, the decision filed was on the merits, and the Circuit Court was directed to proceed according to the law with proper respect for such decision. It was thus bound to dismiss the plaintiff's action, and no other legal course was open.

In the present case, the Supreme Court not only entered in its own court a final judgment against the plaintiff for costs, with right of execution, but ended the controversy, and left no proceedings "according to law," open, but a dismissal by the Circuit Court. In the language of this court, in *Smith* v. *Adams*, *supra*, it directed "the entry of a judgment" which *disposed* of the case.

In *McComb* v. *Com'rs*, 91 U. S. 1, the decision of the State Supreme Court, purposely, at the instance of the defendant, left the case open for further proceedings, and an amendment of the answer and the formation of new issues. This court said, as to the character of the decision of the Supreme Court: "The Supreme Court, so far from putting an end to the litigation, purposely left it open." And further said, as to the judgment of the Common *Pleas* Court, rendered after the Supreme Court decision: "As such it was, when rendered, *open* to *review* by the Supreme Court, and *for that reason* is *not* the *final judgment* of the highest court in the State, in which a decision in the suit could be had."

In the case at bar, the Supreme Court of Wisconsin rendered its decision and judgment adversely as to the very point upon which the plaintiff's right of action rested, and destroyed its case. Its decision was the final decision of the highest court upon the point, which *ended the litigation*, and the judgment of the Circuit Courtof Milwaukee county was in substantial compliance with the final order of the Supreme Court, and was the entering of *its* judgment, and was in "pursuance of law," as thus laid down; and such judgment, as well as the Supreme Court decision, could *never again* be *reviewed* by any court in that State. Opposing counsel are, therefore, in

error, when they say on page 4 of their brief, that the plaintiff could have appealed from the judgment of the Circuit Court. Such an appeal would have been *vain*, and overcome and nullified by the *res adjudicata* of the previous decision and judgment of the Supreme Court.

Northern Pacific R. R. Co. v. *Ellis*, 144 U. S. 458, 464.

In *Davis* v. *Crouch*, 94 U. S. 514, 517, the vital point, as to which the Davis legatees, were in any event entitled to appeal, had not been decided in the Circuit Court, to wit, whether there was not enough to pay their legacy, notwithstanding a waste of the estate by the executor. The Supreme Court of Appeals in its final judgment, ordered the Circuit Court to recommit the report to the commissioner for further inquiry as to debts, etc. it was purely a matter of accounting (as to facts) and ordered to be resumed. After holding such judgment not to be final, this court said: [517.] "After the further proceedings which have been ordered in the Circuit Court, the suit may be again taken to the court of appeals, and another judgment rendered there."

Fisher v. *Perkins*, 122 U. S. 522, was a writ of error to an intermediate Appellate Court of Kentucky from which an appeal might have been taken in the case to the court of appeals, and hence the judgment appealed from was not by the highest court, nor was there any obstacle to such appeal to the higher Appellate Court, by reason of any previous *res adjudicata*, as in the case at bar. The main part of the opinion of this court, in the Kentucky case, was concerning the fact that the plaintiff in error had not *exhausted* his power to have his case transferred to the highest court, *where he might have obtained the relief sought by his writ of error from this court.*

All of these cases cited, both by their facts, and the argument of this court, serve to support the contentions in our main brief for the upholding the jurisdiction of the present writ of error.

We have carefully examined the opinion of this court recently delivered in *Union Mutual Life Ins. Co.* v. *Kirchoff*, No. 132 of this term, (16 Sup. Ct. Repr. 318–320), and authori-

ties cited, and believe it to be consistent with our position. "Further proceedings" consist merely of the entering of judgments and orders. Unlike the case of *Union Mut. Life Ins. Co.* v. *Kirchoff*, *supra*, we have here in the case at bar, both the opinion of the court and the judgment, so that the character of that judgment and the duty of the Circuit Court can be measured.

II.

It is insisted that in order to have presented a federal question in the case at bar, it was necessary that the complaint should have *set out in terms* what faith and credit the decree of assessment, was entitled to in the courts of Illinois; and decisions are cited for the purpose of showing that if *laws* or judgments of one State are relied upon in the courts of another State, they should be pleaded, as well also, as their legal effect in the foreign State.

It is not denied that they should be *pleaded*, and if an issue is joined, and a trial had, they should be proved as other facts.

Griggs v. *Becker*, 87 Wis. 317.

But as to their *effect* in the courts of the sister State, it is not necessary to plead or to prove it, unless *there* different from the domestic laws or judicial proceedings of a similar character. In the complaint, the decree has been fully and sufficiently averred, according to the decisions of the Wisconsin courts, to entitle it to the *full faith* and credit required by the constitution, and it was not necessary by such decisions to set forth in terms the special faith and credit given to the decree in Illinois.

In *Kellam* v. *Toms*, 38 Wis. at page 602, the court said: "It may be that in such a case as this, it might have been sufficient to have pleaded the judgment generally, and the jurisdiction of the court generally." (Citing *Teetshorn* v. *Hull*, 30 Wis. 162.) See also, *Redmon et al.* v. *Fire Ins. Co.*, 51 Wis. 292, 298; *A. C. Conn. Co.* v. *Lumber & Mfg. Co.*, 55 Wis. 588.

It was a fact before the Wisconsin courts upon the plead-

ings, that the decree of assessment, independent of a special averment, was there entitled as against the stockholder defendant, who was an integral part of the plaintiff corporation, and privy to the Illinois chancery proceeding, to the same faith and credit as a *domestic* decree, and the necessary existing presumption in those courts was to that effect.

Rape v. *Heaton*, 9 Wis. 301, 308–315.
Bank v. *McGeoch*, 73 Wis. 332.
Osborn v. *Blackburn*, 78 Wis. 209, 210–213.
Brown v. *Parker*, 28 Wis. 21, 24–7.
Kellam v. *Toms*, 38 Wis. 601-2.

Therefore, "whatever was matter of fact in the court, whose judgment or decree is under review, is matter of fact here."

Chicago & Alton Railroad v. *Wiggins Ferry Co.*, 119 U. S. 622–3.

"Judgments recovered in one State of the Union, when proved in the courts of another are not re-examinable upon the merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause, and of the parties."

Hanley v. *Donoghue*, 116 U. S. 4.

In *Ambler* v. *Whipple*, 139 Ill. 311, 323, the court said, as to the standing of a judgment of the Supreme Court of the District of Columbia, in the Illinois court: " * * * this judgment is to be treated as a domestic judgment. It has the same conclusive effect as a judgment of a court of record of a sister State. The rule that judgments of a competent court in a sister State are conclusive on the merits, extends equally to decrees in chancery."

And the court, referring to its action in *Rae* v. *Hulbert et al.*, 17 Ill. 572, also said: "And we held that we were required to *treat* and give the same effect to the judgment there under consideration as if rendered in this State, or as if that were a proceeding in the State of New York, where the original judgment was rendered." And the court further said:

"Domestic judgments, and those standing upon the like

footing, import verity, and public policy forbids their indirect and collateral contradiction or impeachment."

As to the conclusive character of domestic judgments and decrees upon parties and privies in the courts of Wisconsin, we cite the following:

Jackson v. *Astor*, 1 Pinney 137, 158.
Vilas v. *Reynolds*, 6 Wis. 214, 225.
Pollard v. *Wegener*, 13 Wis. 569, 641.
Wanzer et al. v. *Howland et al.*, 10 Wis. 13.
Board of Supervisors of Iowa County v. *Mineral Point Railroad Co.*, 24 Wis. 93, 115–116, 122–3.

In this latter case it was objected (127) that the decree was not valid and binding because the trustee alone was made a party to the foreclosure suit, and the bondholders not personally brought in; but the court said: "Whenever the parties in interest are, or, from the nature of the case, may be, so numerous that it would be difficult or impracticable to bring them all before the court, and their rights are such as may be fairly and fully represented and tried without joining them, the application of the rule [as to necessary parties] will be dispensed with. * * * In the case we are considering, the trustee was a proper person to represent and defend the interests of his *cestui que trusts*. * * * The holders of the bonds were not, therefore, necessary parties; and the proceedings and decree, without them, are as valid as if they had been brought in. * * * A final decree settling the rights of all parties to the controversy, may be made without bringing such *cestui que trusts* before the court."

And under like circumstances to the effect that a decree against stockholders for the payment of corporate debts, may be conclusive upon them collaterally in the courts of Wisconsin, though not made parties to the chancery suit, see *Adler* v. *The Milwaukee Patent Brick Mfg. Co. et al.*, 13 Wis. 63, 69–70.

The decree in the case at bar, especially finds [Record 12] that "it was and is, therefore, impracticable that all of the stockholders should be made parties to said suit and proceeding."

So that under the law and practice in Wisconsin, this decree, *upon the footing of a domestic decree*, was entitled to full faith and credit in this action. But the decision of the Supreme Court of Illinois in the *Gray* case [122 Ill. 630] had determined the *validity* of the decree and the faith and credit due to it in the Illinois courts in collateral law actions against the stockholders, and the Supreme Court of Wisconsin was bound to be aided thereby.

In *Christmas* v. *Russell*, 5 Wall. 290, the court said (302): "Where the jurisdition has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits." * * * Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the State, and it was undoubtedly correct; and if so, it is not competent for any other State to authorize its courts to open the merits and review the cause, much less to enact that such judgment shall not receive the same faith and credit that by law it had in the State courts from which it was taken."

See, also, cases cited in our original brief, at page 27.

In *Parker* v. *Stoughton Mill Co.*, 64 N. W. Repr. 751, the Wisconsin Supreme Court admitted the conclusive character of the decree against the stockholders, though not parties by name in the chancery case, and said: "It has been so held by the Appellate Court of Illinois in considering this very assessment. *Rand, McNally & Co.* v. *Mutual Fire Insurance Co.*, 58 Ill. App. 528."

The decision in the case at bar, having already been overruled by the Wisconsin Supreme Court, there is no case in that State contradicting the foregoing contentions, but, on the other hand, they entirely *support* them.

III.

As to points II and III of the brief of defendants' counsel, it is believed they are quite disposed of in our original brief. That the decree of assessment is a judicial proceeding, and rises to a higher degree of dignity than a mere call by a board of directors, can not be fairly questioned in view of the many

authorities to the contrary, some of which are noted in our original brief.

Bennett v. *G. W. Tel. Co.*, 53 Ill. App. 276, referred to by opposing counsel on page 6 of their brief, is by the statute, not binding in any other case. It is an unlawful attempt to upset the decree of assessment by a collateral assault, and is supported by a method of reasoning only competent in the chancery suit *previous* to the rendering of the decree, and not proper to be indulged in by a court having no power to review it. It ignores the decision of the Supreme Court of Illinois in the *Gray* case (122 Ill.), which it was bound to follow, and rests *solely* upon the decision of the Wisconsin court rendered in the case at bar, and which that court has now overruled.

It denies the conclusive presumptions *as* to full consideration of *every* objection to the decree, and the *res adjudicata* of the decision of the *Gray* case, and puts its present contention as to its void character upon a ground which it claims was not considered by the Supreme Court in that case, wherein it had, as seen, reversed a former adverse decision by this same intermediate Appellate Court. The decision in this *Bennett* case can not be excused nor defended.

The *Loewenthal* case (154 Ill. 261–8), cited on the two last pages of defendants' brief, was disposed of upon a single question of fact, while the validity of the decree was there maintained; and the comparison drawn by the court between the *decree* of assessment and a *call* by the directors, could not reasonably have been in denial of the *judicial* character of the decree, but only for the purpose of accentuating the court's assertion, that in neither event could a stockholder be thus created, who had not previously entered voluntarily into the contractual relation.

Respectfully submitted,

THOMAS J. SUTHERLAND,
Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Of Counsel.